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IN THE

Supreme Court of the United States

GANGI BROS. PACKING COMPANY, 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC., 7-UP BOTTLING COMPANY OF SAN FRANCISCO, SOUTHEASTERN SPECIALTY FOODS CORP., TRANS-PACKERS SERVICES CORP., and VARNI BROTHERS CORPORATION, dba SEVEN-UP BOTTLING OF MODESTO, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CARGILL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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DECISION OF THE NINTH CIRCUIT
DECIDED SEPTEMBER 1, 1999

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CITRIC ACID LITIGATION

No. 98-15344

7-UP BOTTLING CO. OF JASPER INC., et al.,

Plaintiffs,

and

VARNI BROTHERS CORP., on its own behalf and all others similarly situated dba Seven-Up Bottling of Modesto; 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC.

Plaintiffs-Appellants,

v.

ARCHER DANIELS MIDLAND CO., INC., a Delaware corporation, et al.,

Defendants,

and

CARGILL, INC.,

Defendant-Appellee.

Before: O'SCANNLAIN, McKEOWN, and WARDLAW, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether purchasers were able to establish that a citric acid manufacturer conspired with competitors to fix prices and to allocate market share in violation of the federal antitrust laws.

I

Citric acid is a corn derivative with a wide variety of uses in the manufacture of food, soft drinks, detergents, and pharmaceuticals. Varni Brothers Corp. and 7-Up Bottling Company of Philadelphia, Inc. (collectively "Varni") filed civil antitrust class actions against Cargill, Incorporated ("Cargill"), Archer Daniels Midland ("ADM"), Haarman & Reimer ("H&R"), Hoffman LaRoche ("HLR"), and Jungbunzlauer ("JBL"), alleging that these firms conspired to fix citric acid prices and to allocate market share. These cases were consolidated and transferred to the Northern District of California. The district court certified a class consisting of all people and entities (other than government purchasers and the defendants themselves and affiliated companies) who had purchased citric acid directly from the defendants.

Conceding the existence of a conspiracy in the citric acid market but denying its participation therein, Cargill moved for summary judgment. ADM, H&R, HLR, and JBL (collectively the "admitted conspirators") each admitted to conspiring to fix citric acid prices and reached settlements with Varni. Thus, the only question before the district court was whether Cargill was a member of this conspiracy or, more precisely, whether Varni had produced sufficient evidence such that a reasonable factfinder could so infer. The district court concluded that Varni failed to satisfy this test because its evidence did not "tend[ ] to exclude the possibility that [Cargill] acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588,

106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotation marks and citation omitted). Accordingly, the court granted summary judgment in favor of Cargill and commented that "[a]pparently hoping that quantity will substitute for quality, plaintiffs have submitted voluminous but weak circumstantial evidence that they argue indicates that Cargill was a member of the conspiracy."

On appeal, Varni argues that Cargill's participation in the conspiracy can be reasonably inferred from the circumstantial evidence in the record. Varni also appeals the district court's denial of a discovery motion, an issue we consider in Part IV.

II

To avoid extensive repetition of the facts, we will first consider the legal standard by which we decide whether Varni has produced sufficient evidence to survive summary judgment. By understanding the proper legal framework applicable at the summary judgment stage, we can better analyze the evidence.

A

Price fixing is illegal *per se* under section 1 of the Sherman Act. *See* 15 U.S.C. § 1; *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). "On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763, 104 S.Ct. 1464, 79 L.Ed. 2d 775 (1984). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986) ("Rule 56(c) mandates the entry of

summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Varni can establish a genuine issue of material fact by producing either direct evidence that Cargill conspired to fix citric acid prices or circumstantial evidence from which a reasonable factfinder could conclude that Cargill so conspired. Although Varni argues halfheartedly that it has produced direct evidence that Cargill entered into illegal price-fixing agreements with the admitted conspirators—in which case summary judgment would, of course, be inappropriate, *see McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir.1988); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir.1987)—Varni concedes that such evidence is, at best, weak. Having reviewed the proffered evidence, we can find nothing in the record that establishes, without requiring any inferences, that Cargill participated in the citric acid price-fixing conspiracy. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir.1999) ("*Baby Food*") ("Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted."). We thus agree with both parties that the essential question in this case is whether Varni's circumstantial evidence is sufficient to permit a reasonable factfinder to conclude that Cargill was a participant in the citric acid conspiracy.[1]

Matsushita is the Supreme Court's foremost explanation of how summary judgment works in the antitrust

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[1]In its briefs, Varni argued that it need show only a "slight connection" between Cargill and the conspiracy to survive summary judgment. *See, e.g., United States v. Dunn*, 564 F.2d 348, 357 (9th Cir. 1977). At oral argument, however, Varni expressly disclaimed any reliance upon this theory.

context. *See Matsushita*, 475 U.S. at 585-97, 106 S.Ct. 1348. The *Matsushita* Court began by reaffirming hornbook law that courts are obligated to construe the evidence in the light most favorable to the non-moving party, to give the non-moving party the benefit of all reasonable inferences, and to refrain from making credibility determinations. *See id.* The Court cautioned, however, that, although plaintiffs are to be given the benefit of the doubt, they "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 588, 106 S.Ct. 1348. Importantly, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 586, 106 S.Ct. 1348. Instead, an inference of conspiracy is sustainable only if "reasonable in light of the competing inferences of independent action," and "[t]o survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.*, at 588, 106 S.Ct. 1348 (quoting *Monsanto*, 465 U.S. at 764, 104 S.Ct. 1464); *accord City of Long Beach v. Standard Oil Co. of California*, 872 F.2d 1401, 1404 (9th Cir.1989). The Court warned that permitting the inference of conspiratorial behavior from evidence consistent with both lawful and unlawful conduct would deter pro-competitive conduct—an especially pernicious danger in light of the fact that the very purpose of the antitrust laws is to promote competition. *See id.* at 593, 106 S.Ct. 1348 ("[C]ourts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.").

Based on *Matsushita*, this circuit has outlined a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with

proper business practice." *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir.1987); *accord City of Long Beach*, 872 F.2d at 1406; *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 526-28 (9th Cir.1987); *T.W. Elec. Serv.*, 809 F.2d at 632, 635. The burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior. *See Long Beach*, 872 F.2d at 1406; *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1159 (9th Cir.1988); *Wilcox*, 815 F.2d at 525; *Richards*, 810 F.2d at 902, 904; *T.W. Elec. Serv.*, 809 F.2d at 632.[2]

B

We have repeatedly applied this summary judgment framework, which, to repeat, we must apply whenever the plaintiff cannot establish every element of its case without asking the court to draw an inference in his favor. In *Richards*, a local trucking carrier, Foothills Express, accused major trucking companies of engaging in a concerted group boycott against Foothills Express. The defendant corporations used Foothills Express as an interliner for shipments to the Sacramento area: the defendants carried freight from areas nationwide to Sacramento using their own trucks and Foothills Express made the deliveries from Sacramento to surrounding areas. Foothills Express,

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[2]This second requirement flows directly from *Matsushita*. As then-Judge Kennedy explained in *Richards*:

> Were the case to go to trial, [the antitrust plaintiff] would bear the burden of proving the existence of the alleged conspiracy .... To discharge its burden, it would have to introduce evidence that would permit a jury to conclude that a conspiracy ... [is] more likely than not. If the evidence produced in opposition to a defendant's motion for summary judgment does not give reasonable support to a finding of conspiratorial, as opposed to unilateral, behavior, summary judgment is appropriate.

Richards, 810 F.2d at 903 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106, S.Ct, 2505, 91 L.Ed. 2d 202 (1986); 6 P. Areeda, *Antitrust Law* ¶1405, at 21 (1986)).

however, began soliciting the business of defendants' customers using information gained from carrier freight bills, a practice known as "back solicitation." In response to Foothill Express's back solicitation, each of the defendants cut off or substantially reduced its business with Foothills. *See Richards*, 810 F.2d at 900-01.

Foothills Express alleged that the defendants had violated the antitrust laws by *agreeing* not to employ the services of any local carrier who engaged in back solicitation. In support of its claims, Foothills Express cited the fact that each defendant stopped using its services around the same time. The defendants, however, responded that it was in each defendant's *independent self-interest* to refrain from doing business with local carriers who competed with them. Considering the defendants' explanation, we held that the defendants had "met their burden of proffering a plausible justification for their conduct consistent with proper business practice." *Id.* at 902. Thus, the burden shifted to Foothills to demonstrate that the trucking companies acted pursuant to some sort of *conspiracy*, since the legality of their conduct depended crucially, as is often the case, on whether they had acted independently or pursuant to an agreement.

Foothills Express asserted that the existence of a conspiracy could be inferred from the concession by one of the defendant corporations' presidents that there was "a gentlemen's agreement" with the other major trucking companies against back solicitation. *Richards*, 810 F.2d at 903. We acknowledged that it was possible to interpret this deposition testimony as evidence of an agreement amongst competitors, but noted that this evidence was not necessarily inconsistent with lawful behavior. The evidence could also plausibly be interpreted either as a "refer[ence] to industrywide acceptance of the competitive reality that back solicitation was an abuse of the interlining relation" or as "mean[ing] there were discrete, bilateral understandings between each defendant on one hand, and its interlining

company on the other" (rather than a horizontal agreement amongst the defendants). *Id.* Under both of these latter interpretations, defendants would have engaged only in lawful conduct. Because the circumstantial evidence was as consistent with permissible competitive behavior as with illegal conspiracy—and thus did not tend to exclude the possibility of legitimate behavior—we concluded that the supposed smoking gun was not sufficient for Foothills to overcome defendants' summary judgment motion. *See id.* at 903-04.

We reached a similar conclusion in *T.W. Electrical Service*, in which electrical contractors accused the Pacific Electrical Contractors Association ("PECA") of conspiring with unions to require all contractors to make certain contributions. Because PECA offered a legitimate, non-conspiratorial interpretation of its conduct, we emphasized that, to withstand PECA's summary judgment motion, "the contractors must not only come forward with 'specific facts' showing the existence of a genuine issue of material fact, but also must set forth 'specific facts' that tend to *exclude* the possibility that PECA acted independently." *T.W. Elec. Serv.*, 809 F.2d at 635. In light of the fact that the contractors failed to produce evidence showing that the contribution requirement was the product of an agreement between PECA and others, rather than a requirement unilaterally imposed by PECA, we affirm the grant of summary judgment in favor of PECA. *See id.*

In *Wilcox*, commercial borrowers of the First Interstate Bank of Oregon ("FIOR") sued FIOR alleging that it had conspired with other banks to fix interest rates. After the borrowers successfully convinced a jury to infer conspiracy from evidence of price parallelism, exchanges of pricing information, and opportunities to conspire, the district court granted judgment not withstanding the verdict in favor of FIOR. Agreeing that there was no direct evidence of any agreement to set interest rates, that the circumstantial evidence of price fixing did not tend to exclude the

possibility that FIOR set rates independently, and that FIOR did not act against its own independent self-interest, we affirmed. *See Wilcox*, 815 F.2d at 524-28.

In another case, the City of Long Beach, which sold oil to various major oil companies at a price based on posted prices for Wilmington crude oil, alleged that the oil companies conspired to maintain uniformly low, noncompetitive posted prices. Although it lacked direct evidence of conspiracy, the City produced evidence that the defendants exchanged crude oil amongst themselves using a complicated "three-cut exchange system" rather than simply valuing oil based upon the posted prices. The City asserted that the companies used the three-cut exchange system because the posted prices were rigged: the oil corporations were making an "unusual effort" to maintain the elaborate three-cut exchange system, and the defendants did not demonstrate any advantage of this "cumbersome and inconvenient" system over valuing oil using posted prices. *Long Beach*, 872 F.2d at 1403, 1406. Applying the legal framework outlined above, we concluded that evidence of such behavior, inexplicable absent a conspiracy, *did* tend to exclude the possibility that defendants acted independently and thus reversed the grant of summary judgment in the defendants' favor. *See id.* at 1406-07.

C

Notwithstanding our many cases applying this legal framework for analyzing circumstantial evidence cases, Varni asks us to apply a very different summary judgment standard whereby it need *not* produce evidence tending to exclude the possibility that defendants acted independently even though it relies entirely on circumstantial evidence. Varni cites only a single case, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir.1990), in support of its proposed legal standard. The plaintiffs in that case, however, presented *direct* evidence of conspiracy, *see id.* at 456-57, 459-60 & n.

22, thus making dicta any discussion therein of the standard applicable when plaintiffs rely exclusively on circumstantial evidence. *See United States Natl. Bank of Oregon v. Independent Ins. Agents of Am. Inc.*, 508 U.S. 439, 463 n.11, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (recognizing the "need to distinguish an opinion's holding from its dicta"); *Delta & Pine Land Co. v. Sinkers Corp.*, 177 F.3d 1343, 1349-50 (Fed. Cir.1999) (declining to follow dicta).

The requirement that a plaintiff who relies solely on circumstantial evidence of conspiracy—as Varni does—must produce evidence tending to exclude the possibility that defendants acted independently follows directly from the Supreme Court's opinion in *Matsushita* and is, as we have explained, well-established in both this circuit, *see Long Beach*, 872 F.2d at 1406; *Jeanery*, 849 F.2d at 1159; *Wilcox*, 815 F.2d at 525; *Richards*, 810 F.2d at 902, 904; *T.W. Elec. Serv.*, 809 F.2d at 632, as well as in our sister circuits. *See Mitchael v. Intracorp*, 179 F.3d 847, 858 (10th Cir.1999); *Baby Food*, 166 F.3d at 123; *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569-70 (11th Cir.1998), *petition for cert. filed*, 67 U.S.L.W. 3773 (U.S. June 9, 1999) (No. 98-1997); *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1112 (8th Cir.1997), *cert. denied*, — U.S. —, 118 S.Ct. 1054, 140 L.Ed.2d 116 (1998); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir.1997); *Thompson Everett, Inc. v. National Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir.1995); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1170 6th Cir. 1995); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir.1992); *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir.1990).

With the appropriate legal standard in mind, we now, analyze the evidence in the record.

III

Varni offers a plethora of evidence which it claims shows that Cargill was a member of the citric acid

conspiracy. As Varni emphasizes, the crucial question is whether all the evidence considered as a whole can reasonably support the inference that Cargill conspired with the admitted conspirators to fix prices. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). Thus, we consider the evidence offered by Varni, and then ask whether, in light of all the evidence considered together, a reasonable factfinder could have concluded that Cargill conspired to fix prices.

A

Varni contends that the admitted conspirators and Cargill used the industry's trade association, the European Citric Acid Manufacturers Association ("ECAMA"), as a vehicle for conducting illegal conspiratorial activities. The claim, in a nutshell, is that ECAMA functioned as a front organization for conspiratorial activities.

ECAMA held semi-annual meetings that were attended, on a regular basis, by "masters" (the term used by the conspirators to describe high-level executives involved in the conspiracy who negotiated the broad terms of the conspiracy) and "sherpas" (lower-level corporate executives responsible for implementing the details of the conspiracy), among others. Varni argues that these meetings provided an opportunity for competitors to reach illegal agreements and that it is unlikely that these meetings were legitimate in light of the fact that many of those attending ECAMA meetings were active players in the conspiracy.

Having reviewed the record independently, however, we agree with the district court that there is no evidence to support Varni's theory that these meetings were used to pursue illegal ends. Although the evidence makes clear that representatives of the admitted conspirators gathered in "unofficial" meetings to fix prices and to allocate market shares—often in the same city as, and within a few days of, officially scheduled ECAMA meetings—there is no evidence that illegal activities took place during ECAMA

meetings attended by Cargill representatives. Nor is there evidence that Cargill participated in any of the "unofficial" meetings. Instead, the apparently uncontroverted testimony of Hans Hartmann, president of H&R and a master in the conspiracy, was to the contrary: that official ECAMA meetings were legitimate and that the illegal activities took place in separate, non-ECAMA meetings. According to Hartmann, the ECAMA gatherings merely provided a convenient excuse for the conspirators to be in the city at the same time.

Lacking evidence that the admitted conspirators and Cargill negotiated or reached price-fixing agreements during ECAMA meetings, Varni alleges that the citric acid manufacturers used ECAMA as a mechanism for negotiating illegal agreements with Chinese citric acid producers, whose expanding market share had caused increasing concern among ECAMA members. Varni cites the following evidence: (1) that ECAMA gathered information about Chinese citric acid producers; (2) that ECAMA commissioned a study of "the Chinese situation as to location, production, distribution, prices"; (3) the ECAMA held a meeting to discuss a report on Chinese citric acid producers; (4) that an executive of Gadot Petrochemical Industries, Ltd. ("Gadot") circulated a memorandum advising ECAMA to correspond with Chinese citric acid producers to "stabilize and regulate Chinese production and exports"; and (5) that handwritten notes of an ADM employee at a March 1994 ECAMA working group meeting contained the following statement—"Undertaking is a confidential agreement to maintain price. Producers must police."[3]

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[3]Varni also attempts to rely on a search warrant affidavit by FBI Agent Brian Shepard, which reports what a witness had told the FBI agent that a master had told the witness. The district court did not abuse its discretion in deciding not to consider this evidence because it was hearsay. *See Quevedo v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255, 1258 (9th Cir.1998).

We have little trouble concluding that the first three pieces of evidence do not tend to exclude the possibility of legitimate behavior. Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action. As the Supreme Court has recognized, however, trade associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services. *See, e.g., Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 567, 45 S.Ct. 578, 69 L.Ed. 1093 (1925).

At first glance, the last two pieces of evidence appear more ominous. The Gadot memorandum suggests an illegal course of conduct—that ECAMA contact the Chinese producers and agree to stabilize prices. However, minutes of an ECAMA meeting indicate that the suggestion "was quickly overviewed and it was decided not to pay attention to that message for most of the information contained in it [was] against the spirit of the anti-trust law." It would not be reasonable to infer that Cargill engaged in illegal activities merely from evidence that an illegal course of action was suggested but immediately rejected.[4] Finally, the handwritten notes that constitute the fifth piece of evidence were taken at a meeting at which Cargill was not present. Thus, even if we interpret the notes as Varni asks us to, it would nevertheless not be reasonable to infer from such notes that *Cargill* conspired to fix prices.

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[4]Importantly, we note that Varni's theory of the case is that Cargill conspired with the admitted conspirators to fix prices and to allocate market shares amongst themselves. Varni has not articulated a conspiracy theory wherein Cargill or the admitted conspirators actually conspired with Chinese producers to fix prices or to allocate market shares.

B

Varni argues that, even if ECAMA was not directly used as a mechanism for fixing prices, it served as a front organization for the illegal distribution of detailed, firm-specific information on citric acid production and sales, information which facilitated the policing of agreed-upon market share allocations.

ECAMA collected figures on production and sales from each of its members, audited this information on an annual basis, and produced statistics aggregated by country on citric acid production and sales. ECAMA members reported production and sales information to an independent agent of ECAMA, who distributed information aggregated by country to members. The reason that only aggregate statistics were distributed was to preserve the confidentiality of individual members' sales and production figures. It is uncontested that these activities served the legitimate purpose of informing members of worldwide citric acid conditions and were, in themselves, wholly legal. Cargill vigorously maintains that ECAMA distributed only *aggregate* information.

Varni contends, however, that ECAMA engaged in the additional illegal step of distributing *firm-specific* data to each member firm so that they could verify that all conspirators were adhering to agreed-upon market shares. The only evidence produced by Varni in support of its allegation that members received firm-specific information is a table with detailed, firm-specific market share information found in Cargill's business records. Although Varni asserts that this information could have come only from ECAMA, Cargill maintains that these figures were generated from its own internal market research, and Varni has offered no evidence to the contrary. Moreover, the only other evidence in the record relating to this issue is Hartmann's testimony that the admitted conspirators policed their conspiracy by exchanging sales and production figures on a monthly basis

by telephone, which clearly supports Cargill's position.

Lacking solid evidence that ECAMA ever disclosed firm-specific information to members, Varni falls back upon its argument that such an inference is reasonable in light of the fact that ECAMA hired auditors to verify the information submitted by members. According to Varni, the only conceivable reason ECAMA would have had to hire an independent firm to audit production and sales data is to allow conspirators to police their price-fixing conspiracy.

Cargill, however, offers a legitimate explanation—that the auditing process served the perfectly legal purpose of guaranteeing the reliability of the aggregate statistics on worldwide market conditions that ECAMA distributed to members. Cargill joined ECAMA to get "a more accurate picture of world supply/demand conditions." Cargill, like the other firms, valued having *accurate* information on market conditions throughout the world, because such information was being used to make strategic business decisions. If any ECAMA member submitted inaccurate data (whether intentionally or not), the resulting aggregate statistics would be inaccurate. Decisions made on the basis of inaccurate data are, of course, likely to be sub-optimal. If firms had to worry about whether their competitors were submitting accurate information, they would likely have been less willing to rely on the information distributed by ECAMA in making strategic business decisions. Auditing eliminated this worry.

Applying the legal framework outlined in Part II we conclude that (1) Cargill's participation in an organization that collected and audited members' production and sales figures to calculate and distribute aggregate market statistics is as consistent with legitimate behavior as with conspiratorial behavior, and (2) Varni has failed to produce evidence tending to exclude the possibility that Cargill acted independently.

C

Lacking evidence that ECAMA itself served legal ends, Varni falls back upon the argument that Cargill's decision to join ECAMA in the first place constitutes indirect evidence that Cargill was a participant in the citric acid conspiracy. Its theory is the same here as with much of the other evidence—that Cargill's behavior was inconsistent with its own self-interest and that, since no non-conspiring rational actor would have decided to do what Cargill did, Cargill must have been conspiring.

Cargill asserts that it joined ECAMA to obtain accurate information on worldwide market conditions in the citric acid industry, which it valued because it was considering expanding into foreign markets. In joining, Cargill believed that information on worldwide supply and demand in the citric acid industry would assist it in deciding which markets to enter, when to enter them, and how best to do so.

Varni, however, maintains that the costs of joining ECAMA far outweighed any benefits, such that Cargill must have received some other (*i.e.*, conspiracy-related) benefit from joining. The costs relate to Cargill's obligation, as an ECAMA member, to disclose sales and production information to an independent agent of ECAMA who would calculate the aggregate statistics distributed to members. Cargill itself concedes that it considered the danger that its production and sales figures would fall into the hands of competitors to be a drawback of joining ECAMA. Varni argues that, on the benefits side, Cargill gained little from joining ECAMA because ECAMA's focus was on the European citric acid market and Cargill did not compete in that market.

In response, Cargill points to the uncontroverted evidence in the record that it *did* explicitly weigh the costs and benefits of joining ECAMA and did take steps to assure that its data would be kept as confidential as possible. When

ECAMA and Cargill representatives met in February 1993 to negotiate and discuss terms of membership, Robert Simpson, a Cargill executive, conveyed Cargill's concerns about joining ECAMA. Simpson stated that he recognized that, as an ECAMA member, Cargill would have to disclose production and sales information to ECAMA so that ECAMA could compute aggregate statistics, but wanted to be absolutely sure that Cargill-specific figures would not fall into the hands of competitors. In a letter of March 12, 1999, ECAMA's Secretary responded, explaining that Cargill's data would be kept confidential and that only aggregate market data would be provided to other firms. The Secretary did, however, acknowledge that when Cargill joined ECAMA, ECAMA members would be able to derive a one-time estimate of Cargill's sales and productions figures by comparing the pre-Cargill figures with the new figures after Cargill's joinder, with the difference roughly equaling Cargill's sales and production figures.

Simpson evaluated the costs and benefits of joining ECAMA in an internal memorandum. By joining ECAMA, Cargill would get a better picture of world supply and demand conditions, which would be of increasing importance as Cargill expanded worldwide. In addition, Cargill stood to benefit from ECAMA's work on product development and other industry-related matters. Simpson noted that "[t]he only drawback to ECAMA membership [was] disclosure of Cargill's sales volume and production capacity," but concluded that this drawback was minimal because, "[a]fter several detailed discussions with ECAMA, I feel comfortable with the confidentiality of Cargill trade data and ECAMA's position on national competition laws (antitrust)." Weighing the costs against the benefits, Simpson recommended that Cargill join ECAMA, and Cargill subsequently did so in May 1993.

To the extent that Cargill's decision is consistent with conspiratorial behavior, the evidence is equally well, if not better, interpreted as a decision in Cargill's own independent

self-interest. Cargill offered a sound reason for joining ECAMA, and, importantly, Varni's evidence does not tend to exclude the possibility that Cargill, acting independently, reasonably concluded that the benefits of membership outweighed the costs. Varni's theory might be validated if information on worldwide market conditions were truly useless to Cargill, but this information was valuable because Cargill was considering expanding abroad. Finally, we note that Varni's argument that information on worldwide market conditions was worthless to Cargill is inconsistent with its attacks on Cargill for not expanding operations rapidly enough outside of the United States. *See infra* Part III.D.

D

Varni argues that Cargill's failure to expand its production capacity more rapidly than it did constitutes circumstantial evidence that it was conspiring to fix prices. When it entered the citric acid market, Cargill's production facility had an annual production capacity of 56 million pounds. In 1992, Cargill expanded capacity to 80 million pounds. In March 1992, Cargill issued a press release announcing that it would double capacity to 160 million pounds per year. Sometime in or before October 1992, however, Cargill decided to increase capacity from 80 million to only 120 million pounds.[5] Varni contends that Cargill's decision to expand capacity by 50 percent rather than by 100 percent is circumstantial evidence that Cargill was conspiring to fix prices and allocate market share.

The timing of this decision, however does not fit with Varni's theory of the conspiracy. Varni contends that Cargill was a vigorous competitor until it turned conspirator in 1993, but the decision to expand capacity to 120 million rather than

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[5]This expansion was completed by 1994. Cargill also implemented improvements such as installing a liquid extraction recovery process, which increased the efficiency of the manufacturing process.

160 million pounds was made by late 1992. Because "the factual context renders [appellants'] claim implausible," no reasonable factfinder could conclude from this evidence that Cargill was part of the conspiracy. *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348.

Moreover, Cargill *did* expand rapidly. It increased its annual production capacity from 56 million to 80 million and then to 120 million—in only a matter of years. Faulting a company for expanding too slowly where it doubled capacity in a few years would subject countless strategic business decisions to second-guessing by courts. Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgment should not be second-guessed even where the evidence concerning the rationality or the challenged activities might be subject to reasonable dispute. *See Reserve Supply*, 971 F.2d at 49-53; *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 662 (7th Cir.1987).[6] Cargill has explained why it did not expand even more rapidly: it was concerned that an excessively rapid expansion in citric acid supply would undermine prices and wanted to avoid precipitating a costly price war as it had done when it first entered the citric acid market (incurring substantial losses as a result).

E

Varni contends that Cargill "decided" to stop increasing its market share in 1993, which only a conspirator would have done. We note, as an initial matter, that it is not reasonable to infer that a firm is engaging in illegal activities merely from the fact that it failed to continue to increase market share. If a conspiracy could be inferred so easily, then no firm against whom an antitrust claim is levied would

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[6]For the same reason, we reject Varni's assertion that illegal conduct can be inferred from Cargill's failure to expand more rapidly in Europe.

ever be entitled to summary judgment unless it continually increased its market share. In light of the fact that firms enjoy discretion in exercising business judgment, *see supra* Part III.D, such a rule of law was untenable.

In any case, there is no evidence in the record supporting Varni's claim that Cargill's market share flattened after 1993. Varni attempts to rely on market share statistics contained in an internal Cargill document cited in the report of its economic expert. *See infra* n. 9. That document, however, was not included as part of the summary judgment record. To be considered in a motion for summary judgment, "documents must be authenticated by and attached to an affidavit that meets the requirements of [Federal Rule of Civil Procedure] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir.1989) (internal quotation marks omitted). The document on which Varni relies for its market share figures was not submitted as part of the summary judgment record, and thus we do consider it.

Varni attempts to get this document in through the back door. First, it argues that this data is admissible because it is discussed in an expert report which *was* part of the record. The law is clear, however, that an expert report cannot be used to prove the existence of facts set forth therein. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir.1984); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them,); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir.1995) (same). Varni makes the alternative argument that the expert report can be used to show the truth of facts stated therein because it is a summary of the data admissible under Federal Rule of Evidence 1006. Varni, however, has failed to show that the underlying document that it neglected to attach as evidence to its

opposition motion qualifies as a voluminous writing that cannot be conveniently examined. *See* Fed.R.Evid. 1006 ("The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.").

Because there is no evidence in the record establishing that Cargill's market share was constant between 1993 and 1995,[7] any inference founded upon that factual assertion—even one drawn by an economic expert—is necessarily unreasonable. *See Brooke Group*, 509 U.S. at 242, 113 S.Ct. 2578 ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

F

Varni argues that the fact that Cargill's list prices mirrored those of its competitors is evidence of conspiracy. A section 1 violation cannot, however, be inferred from parallel pricing alone, *see Wallace*, 55 F.3d at 1168; *Wilcox*, 815 F.2d at 526; *Reserve Supply*, 971 F.2d at 50, nor from an industry's follow-the-leader pricing strategy, *see United States v. International Harvester Co.*, 274 U.S. 693, 708-09, 47 S.Ct. 748, 71 L.Ed. 1302 (1927); *Wilcox*, 815 F.2d at 526. Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other "plus" factors, an inference of conspiracy can be reasonable. *See Petroleum Prods.*, 906 F.2d at 441-60.

It is true that Cargill's list prices have generally been nearly identical to those of ADM and H&R. Between 1990 and 1997, ADM, H&R, and Cargill always changed list prices within a month of one another and generally did so in

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[7]In fact, the only market share data actually in the record—and thus the only data properly before this court—indicates that Cargill's market share continued to increase even after 1993.

the same month. We must, however, consider the evidence in the record as a whole. *See Continental Ore*, 370 U.S. at 699, 82 S.Ct. 1404. Although there appears to have been little competition in citric acid *list* prices, Cargill did price aggressively in actual contracts. An internal Cargill document stated its strategy of generally "[s]upport[ing] industry price increases" but "[s]electively compet[ing] at strategic accounts." As part of this strategy, Cargill reached agreements to supply most of the citric acid needs of Coca-Cola, Pepsi, Kraft General Foods, Procter & Gamble Beverage, and Quaker Oats, and these five accounts constituted the majority of Cargill's sales.

Also relevant is Cargill's success in gaining 22 percent of the United States market share by 1995, which came largely at the expense of ADM and H&R. A May 1993 H&R internal monthly report expressed exasperation with Cargill's success, reporting as follows: "We as a company can no longer take a position of 'maintaining our share of the business'. [sic] Why? Because we are losing! Cargill has new capacity coming on stream and they will continue to go after anyone they can get. Each time we play it conservative in our negotiations and price offerings Cargill beats us by half to one cent. Most of the time its [sic] a price issue." A second H&R internal report from 1994 on the domestic citric acid market concluded that Cargill had gained market share from ADM and H&R by consistently underpricing them. A third H&R document, dated 1995, similarly reported that "Cargill has been quite aggressive with citric price offers."

Considering the foregoing evidence together, we conclude that the evidence does not tend to exclude the possibility that Cargill acted legally in its pricing decisions.

G

Varni asks the court to infer Cargill's role in the conspiracy from the fact that representatives of Cargill attended meetings and had telephone conversation with individuals who have been identified as masters and sherpas.

Varni does not offer any specific details with regard to illegal discussions, but instead merely asks us to infer participation in the conspiracy from the opportunity to do so. Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity. *See Baby Food*, 166 F.3d at 126 ("[C]ommunications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'") (quoting *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir.1994)).

H

Varni argues that the fact that Cargill's files contained copies of competitors' price lists is circumstantial evidence that Cargill was conspiring with competitors to fix prices. Varni relies upon *United States v. Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), in which the Supreme Court held that the reciprocal exchange of price information pursuant to an agreement by the defendants was concerted action sufficient to establish a price-fixing conspiracy. There is, however, a crucial difference between that case and the case before us. Unlike the plaintiffs in *Container* who presented evidence of an agreement to exchange pricing information, *see Container*, 393 U.S. at 340, 89 S.Ct. 510; *accord Baby Food*, 166 F.3d at 125-26, Varni has made no showing—or even any claim—that there was an agreement to exchange pricing information.

Although the possession of competitor price lists is consistent with conspiracy, it does not, at least in itself, tend to exclude legitimate competitive behavior. *See Baby Food*, 166 F.3d at 125; *Wallace*, 55 F.3d at 1169; *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 996 (4th Cir.1990). There are many legal ways in which Cargill could have obtained pricing information on competitors. *See United States v. United States Gypsum Co.*, 438 U.S. 422,

441 n. 16, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *Petroleum Prods.*, 906 F.2d at 455 ("To allow an inference of agreement from such evidence, standing alone, would have the effect of deterring competitors from obtaining information about other companies' actual retail prices, even through legitimate means. We can think of few inferences that would have a more undesirable distorting effect on market conduct."). Varni has not, for example, produced evidence tending to exclude the possibility that Cargill received these price lists legitimately from customers after they were distributed by competitors as Cargill claims.

I

Varni contends that a 1994 H&R document recommending that H&R "gain share at accounts where no significant effect on ADM, Cargill, JBL share" is circumstantial evidence of Cargill's role in the conspiracy because H&R would have been concerned about taking market share from Cargill only if they were conspiring with one another. Cargill responds with an innocent explanation—that H&R avoided competing directly with Cargill because H&R had consistently lost when it tried to do so due to Cargill's lower prices, and that H&R apparently found it easier simply to compete with other firms instead.[8]

In a similar case, plaintiffs produced what they characterized as direct evidence of a horizontal conspiracy. Upon close analysis, however, this court concluded that such evidence could be interpreted as evidence of a horizontal conspiracy but also could be construed in a benign light. We held that, in such a situation, the purported "smoking gun" was not sufficient in itself to preclude summary judgment because evidence as consistent with legitimate behavior as

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[8]This document is not direct evidence of conspiracy because there remains a gap between the document and the conclusion that Cargill was a conspirator, a gap that can be bridged only by making some sort of inference. *See Baby Food*, 166 F.3d at 120-21.

illegal behavior cannot independently support an inference of conspiracy. *See Richards*, 810 F.2d at 90304.

The Third Circuit recently reached a similar conclusion when it was confronted with purported smoking gun evidence in an antitrust price-fixing case involving the baby food industry. In *Baby Food*, an internal Heinz memorandum contained the following statement:

> I was told by [a prospective Heinz customer] that they wanted to stock only two brands of baby food—Gerber and someone else. Their main objective was to stock the lines that were preferred by the retailers. I advised them that we would make every effort to secure a majority base of distribution. However, with our "truce" in effect, our hands were tied.

Baby Food, 166 F.3d at 120. The *Baby Food* plaintiffs contended that the "truce" was evidence of a price-fixing conspiracy namely, that Heinz's hands were "tied" because they had *agreed* not to lower prices. The Third Circuit rejected this argument and concluded instead that "the single use of the term ['truce'] in a highly competitive business environment and in the face of continuing fierce competition is as consistent with independent behavior as it is with price-fixing." *Id.* at 127.

Considering Varni's interpretation of this evidence in light of Cargill's explanation, we conclude that the district court did not err in ruling that this evidence did not tend to exclude the possibility that Cargill was acting lawfully.

J

Varni also cites scattered evidence from 1991 and 1992 which purportedly supports an inference that Cargill was a conspirator. In its briefs, however, Varni conceded that "[u]ntil mid-1993, Cargill competed with the Admitted Conspirators." At oral argument, Varni argued that Cargill joined the conspiracy in October 1992—when Cargill indicated its receptiveness to joining ECAMA—rather than in May 1993—when Cargill actually joined ECAMA. Even

under this revised theory, all circumstantial evidence pre-dating October 1992 is irrelevant because it does not comport with Varni's theory that Cargill joined the conspiracy in October 1992.

K

Varni points to the trial testimony of ADM employee Barrie Cox in a criminal proceeding involving a price-fixing conspiracy in the lysine industry, in which Cox stated that he had discussions regarding the "bidding price for certain [citric acid] accounts" with someone from Cargill, and maintains that Cox's testimony constitutes direct evidence of price-fixing by Cargill. Cox's testimony at the lysine trial does not constitute direct evidence, however, because it still requires an inference that the price discussions were conspiratorial in nature. Furthermore, Cox's trial testimony, not subjected to cross-examination, does not possess the requisite specificity to withstand summary judgment. See *Baby Food*, 166 F.3d at 125 ("Evidence of sporadic exchanges of shop talk among field representatives who lack pricing authority is insufficient to survive summary judgment.") (citing *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir.1982)).

Subsequent to oral argument in this case, Varni filed a request for judicial notice of and motion to supplement the record with the government's sentencing memorandum in the lysine conspiracy case. Varni relies in particular on an FBI investigative report attached to the sentencing memorandum, which summarizes statements allegedly made by ADM employee Cox in an FBI interview. According to the report, Cox claimed that he had discussions with Cargill employee William Gruber regarding the bidding price for specific citric acid accounts. Varni argues that Cox's statements, as described in the FBI report, constitute specific, direct evidence of price-fixing by Cargill in the citric acid industry.

Cargill has vigorously opposed Varni's request for

judicial notice, offering several arguments as to why the substance of Cox's FBI interview statements is not a proper subject for judicial notice. Cargill makes the following arguments: (1) Cox's statements in the FBI report are inadmissible "triple hearsay"; (2) the statements are inadmissible under Federal Rule of Evidence 403 because they lack probative value; (3) as a general rule, the summary judgment record cannot be supplemented on appeal and is limited to material before the district court; and (4) under Federal Rule of Evidence 201, only facts "not subject to reasonable dispute" can be proper subjects of judicial notice, and Cox's statements fail to satisfy this requirement. The arguments offered by Cargill against Varni's request for judicial notice possess considerable force.

We need not resolve the dispute over whether judicial notice of this evidence would be proper, however, because the documents Varni seeks to add to the record would not change the result in this case, for several reasons. First, the documents support Cargill's theory that Cargill was not part of the "Group of Four" or the "Group of Five" (the terms used by the citric acid conspirators in referring to themselves). Second, Cox's statements in the FBI report show, at best, that Cox engaged in sporadic price discussions with one individual at Cargill, which evidence is neither sufficient to survive summary judgment under *Baby Food* nor probative of the industry-wide conspiracy alleged by Varni. Third, the documents upon which Varni seeks to rely do not comport with Varni's theory that Cargill joined the conspiracy when it joined ECAMA in May 1993, since the FBI report on which Varni relies makes clear that the conspirators considered asking Cargill to join the conspiracy in 1995—some two years after Cargill joined ECAMA. In sum, even if we were to grant Varni's request for judicial notice, the new evidence would not alter the outcome because it appears to be inconsistent with Varni's theory of the case.

L

Applying the legal framework set forth in *Matsushita* and developed through several subsequent cases in this circuit, we have concluded that none of the various pieces of evidence offered by Varni supports a reasonable inference that Cargill conspired to fix prices because none of the evidence, when considered individually, tends to exclude the possibility that Cargill acted independently.[9] The crucial question, however, is whether the evidence *considered as a whole* can support an inference of conspiracy on Cargill's part. As we stated at the outset of this analysis, such an inference may still be plausible when looking, as we must, at the big picture. Summing the iotas up, of course, makes it more difficult to say whether a reasonable factfinder could conclude that Cargill was more likely than not a conspirator, especially in light of the fact that this case is unique in that several citric acid manufacturers have already admitted to conspiring about prices.

Considered as a whole, the evidence in the record, though it clearly shows that several citric acid producers conspired to fix prices and to allocate market shares, does

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[9]Varni argues that the reports of its expert economist, Robert G. Harris, mandate the denial of Cargill's summary judgment motion. Harris concluded that a company acting independently would not have done many of the things that Cargill did. Purported to be irrational absent conspiratorial behavior on the part of Cargill were Cargill's decision to join ECAMA (the strongest piece of evidence in Harris's view), the virtual identity in list prices among citric acid producers, Cargill's failure to increase its market share between 1993 and 1995, its failure to expand its annual production capacity by more than it did, its decision not to enter the European citric acid market sooner, and the fact that, "given the number and type of known contacts—to say nothing of other possible communications—between Cargill and personnel of the admitted conspirators, it is inconceivable that Cargill remained ignorant of the existence of the conspiracy." We have already considered all the evidence discussed by Harris, *see supra* Part III.A–III.L, and our conclusion that no piece of evidence tends to exclude the possibility that Cargill acted independently is not affected by the conclusory statements in the expert report to the contrary. *See Brooke Group*, 509 U.S. at 242, 113 S.Ct. 2578.

not tend to exclude the possibility that Cargill acted independently—and thus does not support a reasonable inference that *Cargill* was involved in the citric acid price-fixing conspiracy. Cargill has offered reasonable legitimate explanations for joining ECAMA, for its strategic decisions relating to expansion, for its citric acid pricing, and for the various other pieces of evidence offered by Varni purportedly showing that Cargill engaged in price fixing. We note that all four major citric acid manufacturers admitted to conspiring to fix prices but none identified Cargill as a co-conspirator. All in all, there is no more than a scintilla of evidence that Cargill was a participant in the citric acid conspiracy, and the existence of "a scintilla of evidence of concerted, collusive conduct" is not sufficient for Varni to overcome Cargill's summary judgment motion. *Baby Food*, 166 F.3d at 137.[10] Thus, the district court did not err in granting summary judgment in favor of Cargill.

IV

Finally, we address whether the district court abused its discretion in denying Varni's motion to compel Coopers & Lybrand L.L.P. ("C&L–US") to produce various documents in its possession and in the possession of Societe Fiduciare Suisse Coopers & Lybrand ("C&L–Switzerland"), which had performed certain accounting and auditing work for ECAMA.

A

C&L–Switzerland and C&L–US are both members of Coopers & Lybrand International ("C&L International"), an association (organized under the laws of Switzerland) consisting of member accounting firms around the world (including C&L–US and C&L–Switzertand). By virtue of

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[10]Because the evidence must, on summary judgment, be construed to the greatest extent reasonably possible in favor of finding an antitrust violation, rare is the antitrust case in which there is absolutely no evidence which could support some inference of an antitrust violation.

membership in C&L–International, member firms are allowed to utilize the Coopers & Lybrand name. Although members use the "Coopers & Lybrand" name, each firm is autonomous. Firms do not share profits or losses, nor do they have any management, authority, or control over other member firms. In addition, C&L–International does not exercise management, authority, or control over member firms. Of particular relevance to the case at hand, C&L–US does not have any economic or legal interest in C&L–Switzerland, and C&L–Switzerland has no such interest in C&L–US.

Varni served C&L–US with a subpoena to produce various documents in its possession and in the possession of C&L–Switzerland. C&L–US produced all the relevant documents in its possession and wrote a letter to C&L–Switzerland asking if it would voluntarily turn over the documents sought by Varni. C&L–Switzerland declined. Varni then filed a motion to compel C&L–US to produce C&L–Switzerland's documents. The magistrate judge ruled that, under Federal Rule of Civil Procedure 45(a), Varni could compel only C&L–US to produce those records in its legal control. Finding that C&L–US lacked legal control over documents held by C&L–Switzerland, the magistrate denied the motion to compel in an order subsequently adopted by the district court. Varni argues that the district court abused its discretion by denying its motion to compel.

B

The Federal Rules of Civil Procedure require a party served with a subpoena for records to produce those records that are in its "possession, custody or control." Fed.R.Civ.P. 45(a). The documents in question are neither in the possession nor custody of C&L–US. Thus, the only question before us is whether C&L–US has "control" over documents in the possession of C&L–Switzerland.

"Control is defined as the legal right to obtain documents upon demand." *United States v. International*

Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452 (9th Cir.1989) ("*International Union*"). In *International Union*, the Department of Labor had served a subpoena on the International Union of Petroleum and Industrial Workers ("IUPIW"), seeking records from local unions affiliated with IUPIW. The court concluded that IUPIW lacked legal control over documents in the possession of local unions because IUPIW and each local union were separate entities under the law and be cause the contract governing the union relationship did not expressly give IUPIW the right to obtain the records of local unions upon demand. *See id.* at 1452-53. Although there was a theoretical possibility that IUPIW could dissolve a local union and thereby gain access to the documents of the dissolved union, the court deemed this remote possibility insufficient to give IUPIW "control" for purposes of Federal Rule 45(a). The court emphasized that proof of theoretical control is insufficient; a showing of actual control is required. *See id.* at 1453-54.

Varni concedes—as it must—that the district court's ruling was correct under an application of the legal control test, because there is no dispute that C&L–US lacks the legal ability to obtain documents from C&L–Switzerland. Just as IUPIW and the local unions were separate entities under the law, so are C&L–US and C&L–Switzerland. Also as in *International Union*, there is no contract giving C&L–US the right to compel C&L–Switzerland to furnish it with documents in C&L–Switzerland's possession.

Recognizing that the district court's ruling is entirely consistent with *International Union*, Varni urges this court to reject the legal control test used in *International Union*. It asks us instead to define "control" in a manner that focuses on the party's practical ability to obtain the requested documents and argues that *International Union* does not foreclose the application of this practical-ability-to-obtain documents test, because *International Union*'s decision to apply the legal control test rather than the practical-ability-to-obtain-documents test is purportedly "an unexamined

assumption," which *stare decisis* does not compel the present court to follow.

Even if *International Union* does not conclusively settle the question, we conclude—consistently with all of our sister circuits who have addressed the issue—that the legal control test is the proper standard under Rule 45. *See Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229-30 (Fed.Cir.1996); *In re Bankers Trust Co.*, 61 F.3d 465, 469(6th Cir.1995); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir.1993); *Gerling Int'l Ins. Co. v. Commissioner*, 839 F.2d 131, 140-41 (3d Cir.1988); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir.1984). Ordering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents. Varni claims that C&L–US has the practical ability to obtain documents from C&L–Switzerland because C&L–Switzerland has voluntarily furnished C&L–US with documents and information in the past. With respect to the ECAMA documents, however, C&L–US has asked C&L–Switzerland to produce those documents, but C&L–Switzerland refused. There is no mechanism for C&L–US to compel C&L–Switzerland to produce those documents, and it is not clear how Varni wants C&L–US to go about getting the ECAMA documents, since C&L–Switzerland could legally—and without breaching any contract—continue to refuse to turn over such documents. Because C&L–US does not have legal control over C&L–Switzerland's documents, Varni could not compel C&L–US to produce those documents.

V

For the foregoing reasons, we conclude that the district court did not err either by granting summary judgment in favor of Cargill or by denying Varni's motion to compel.
AFFIRMED.

DECISION OF THE UNITED STATES DISTRICT COURT
In Re CITRIC ACID ANTITRUST LITIGATION.
This document relates to all actions.
MDL No. 95-1092 and Master File No. C-95-2963 FMS
United States District Court,
N.D. California
October 1, 1996, Decided
October 2, 1996, FILED

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION
FERN M. SMITH, DISTRICT JUDGE

INTRODUCTION

The individual *2 and representative plaintiffs ("plaintiffs") seek certification under Federal Rule of Civil Procedure 23(a)(1)-(4) and 23(b)(3) of the following plaintiff class ("class"):

All persons and entities in the United States (excluding governmental entities, defendants, defendants' parents, subsidiaries and affiliates, and other producers of citric acid and their subsidiaries and affiliates) who purchased citric acid directly from any of the defendants at any time during the period from January 1, 1991 to and including June 30, 1995.[11]

The class alleges a conspiracy among defendants to raise, fix, maintain, and stabilize prices of citric acid throughout the United States, and to allocate their major customers or accounts among themselves for the purpose of selling citric acid in violation of section one of the Sherman Act, *15 U.S.C. §1,* and sections four and sixteen of the Clayton Act, *15 U.S.C. §15,* 26.

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[11]Plaintiffs seek to interpret this definition as including those who purchased citric acid outside the United States, as well. The definition is not susceptible to this interpretation.

BACKGROUND

Citric acid is an amino acid derived from corn. It comes in a *3 variety of forms, including crystal, powder, and liquid, and has a wide range of uses. It is used as a preservative and flavoring agent in food; as a phosphate substitute in cleaning products; as a flavoring and stabilizing agent in pharmaceuticals; for industrial cleaning and finishing; and in agriculture. Defendants in this lawsuit are major manufacturers, sellers, and/or distributors of citric acid in the United States.

In June 1995, the Department of Justice began an investigation into possible antitrust violations in the citric acid industry. In August 1995, plaintiffs, who are purchasers of citric acid, began to file claims against defendants.

Plaintiffs allege a conspiracy among defendants to raise, fix, maintain, and stabilize prices of citric acid throughout the United States, and to allocate their major customers or accounts among themselves. Defendants allegedly effected the conspiracy by discussing and agreeing on general price increases; approving and issuing general price increases to reflect their agreements; and monitoring and enforcing adherence to those prices. As a result, plaintiffs allege,. purchasers of citric acid paid artificially high and non-competitive prices *4 for the product. Plaintiffs seek declaratory and injunctive relief, as well as treble damages under antitrust law.

Plaintiffs proffer six class representatives. Trans-Packers Services Corp., of New York, is a contract packaging firm that prepares dry food and beverages for the Department of Defense and large private companies. Varni Brothers Corp., of California, manufactures, bottles, cans, and distributes soft-drinks and other beverages. The 7-Up Bottling Company of Philadelphia was, until a recent asset sale, a major soft-drink bottling company in the mid-Atlantic region. Southeastern Specialty Foods, of Mississippi, was a manufacturer and bottler of fruit beverages until the fall of

1994. Gangi Brothers, of California, is a processor of tomato products. The 7-Up Bottling Company of San Francisco is a major soft-drink bottling company in the western region.

DISCUSSION

I. Evidentiary Burden and Standard for Class Certification

The burden of proving that a class is appropriate rests with the proponent of the class. *In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 854 (9th Cir. 1982);* Shields v. Smith, 1992 Transfer Binder *5 *Fed. Sec. L. Rep. (CCH) P 97,001, 94,376 (N.D. Cal. 1992).* The party seeking to maintain the action as a class suit must, therefore, establish a prima facie showing of each of the four certification prerequisites and must demonstrate that appropriate grounds for a class action exist. *Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975),* cert. denied, *429 U.S. 816, 50 L. Ed. 2d 75, 97 S. Ct. 57 (1976).* The failure to carry this burden as to any one of the requirements precludes the maintenance of the lawsuit as a class action. *Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975).*

Class certification is governed by Federal Rule of Civil Procedure 23, which provides for a two-step procedure. First, subsection (a) of Rule 23 sets out four conjunctive requirements that must be met in all class actions:
(1) the class must be so numerous that joinder of all members is impracticable, (2) there must be questions of law or fact common to the class, (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and (4) the representative parties must fairly and adequately protect the *6 interests of the class.

If these requirements are met, the proponent must also show that it has met one of the four disjunctive prerequisites of subsection (b) of Rule 23. Under this subsection, the Court must find either: (1) that common questions of law or

fact predominate and that a class action is superior to other available methods of adjudication; (2) that the defendant acted or refused to act on grounds generally applicable to the class, so that declaratory or injunctive relief is appropriate with respect to the entire class; (3) that the prosecution of individual actions would create a risk of inconsistent verdicts that would establish incompatible standards of conduct for defendant; or (4) that adjudication of individual claims would be dispositive of the claims of non-party class members, or substantially impede the ability of non-party class members to pursue their own claims. Fed. R. Civ. P. 23(b)(1)-(3).

Before ordering that a lawsuit may proceed as a class action, the trial court must rigorously analyze whether the class action allegations meet the requirements of Rule 23. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. *7 2364 (1982); Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992).* Because the early resolution of the class certification question requires some degree of speculation, however, all that is required is that the Court form a "reasonable judgment" on each certification requirement. In formulating this judgment, the Court may properly consider both the allegations of the class action complaint and the supplemental evidentiary submissions of the parties. *Blackie, 524 F.2d at 900-01 & n.17.*

II. Analysis

A. Rule 23(a) Requirements

1. Numerosity

Rule 23(a)(1) requires that the size of the proposed class be so large that joinder of all class members is impracticable. There is no set numerical cut-off. *Welling v. Alexy, 155 F.R.D. 654, 656 (N.D. Cal. 1994)* (citing example of approved class with fourteen members, and case in which

certification was denied for class of more than 300).

Plaintiffs are unable to give a precise number of class members at this stage; however, they maintain that based on the nature of the citric acid market and the allegation of a nationwide conspiracy, the total number of class members will be in the thousands. *8 Pls.' Mem. at 8. A finding of numerosity may be supported by such common-sense assumptions. *Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 184 (N.D. Ill. 1992).* Defendants do not dispute that this first requirement is met.

2. Common Questions of Law or Fact

Rule 23(a)(2) requires that there be questions of law or fact common to the members of the proposed class. Plaintiffs argue that their antitrust claims against defendants involve common legal and factual questions regarding the existence, scope, and effect of the alleged price-fixing conspiracy. In deciding to transfer this litigation to the Court, the Judicial Panel on Multidistrict Litigation expressly found that the actions present common questions of fact. In re Citric Acid Antitrust Litig., MDL-1092, at 4-5 (J.P.M.L. 1995). Defendants do not dispute that this requirement is met.

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the plaintiff seeking to be the named representative for the class be typical of those of the other members of the class for which certification is sought. The claims and defenses are typical if they stem from the same event, practice, or course of conduct *9 that forms the basis of the claims of the class and are based on the same legal or remedial theory. *Jordan v. County of Los Angeles, 669 F.2d 1311, 1321 (9th Cir. 1982),* vacated on other grounds, *459 U.S. 810 (1982).*

The alleged underlying course of conduct in this case

is defendants' conspiracy to fix the price of citric acid and to allocate customers among themselves during the period from January 1, 1991 through June 30, 1995. The legal theory that plaintiffs rely on is antitrust liability. Because plaintiffs and all class members share these claims and this theory, the representatives' claims are typical of all. See In re Amino Acid Lysine Antitrust Litig., No. 95 C 7679, MDL-1083, at 16 (1996). Defendants do not dispute that this requirement is met.

4. Adequacy of Representation

Rule 23(a)(4) requires that the plaintiff seeking to certify a class demonstrate that as the representative of the class she will fairly and adequately protect the interests of the class. Parties are generally considered to be adequate representatives of absent class members if there are no conflicts of interest between the representatives and class members, and if the Court is persuaded *10 that counsel for the representatives will vigorously pursue the action. *General Tel. Co. of Southwest v. Falcon, 457 U.S. at 157 n.13.*

Defendants contend that the proffered representatives are inadequate because (1) they are unfamiliar with the case, and (2) they are not truly representative of the class.

a. Familiarity With the Case

In determining the adequacy of representation of a class, "the emphasis has been and should be placed on whether the representative's counsel is capable." Shields v. Smith, 1992 Transfer Binder *Fed. Sec. L. Rep. (CCH) P 97,001, at 94,377 (ND. Cal. 1992); Weinberger v. Jackson, 102 F.R.D. 839, 845 (N.D. Cal. 1984).* Defendants do not contest the qualifications of plaintiffs' counsel. They do contest the named plaintiffs' familiarity with the case, however, and that is also a factor that courts consider in

determining adequacy.

The threshold of knowledge required to qualify a class representative is not high; a party must be familiar with the basic elements of his claim, *Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144, 153-54 (N.D. Cal. 1991),* and will be deemed inadequate only if she is "startlingly unfamiliar" *11 with the case. *Greenspan v. Brassler, 78 F.R.D. 130, 133-34 (S.D.N.Y. 1978);* see also *Welling v. Alexy, 155 F.R.D. at 659* (plaintiff inadequate because he showed a "complete lack of interest in the conduct of the case"); *Koenig v. Benson, 117 F.R.D. 330, 337 (E.D.N.Y. 1987)* (plaintiff inadequate because of "alarming unfamiliarity" with lawsuit).

It is not necessary that a representative "be intimately familiar with every factual and legal issue in the case." In re Worlds of Wonder Sec. Litig., 1989-1990 Transfer Binder *Fed. Sec. L. Rep. (CCH) P 95,004, 95,627 (N.D. Cal. 1990).* It is enough that the representative understand the gravamen of the claim. Id. Those courts that have found representatives inadequate have done so because plaintiffs knew nothing about the case and completely relied on counsel to direct the litigation. E.g., *Rolex Employees Retirement Trust v. Mentor Graphics Corp., 136 F.R.D. 658, 665-66 (D. Or. 1991).*

Defendants make a series of arguments regarding the familiarity of each representative with the litigation. They contend that plaintiffs are unfamiliar with the parties and counsel in the case, the procedural history of the case, *12 the market for citric acid, and their responsibilities as class representatives. See Defs.' Mem. at 6-11. Defendants also assert that plaintiffs have no personal knowledge of any price-fixing. Id.

Based on a review of the deposition testimony presented by plaintiffs and defendants,[12] the Court finds that

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[12]The Court's analysis is hindered by the failure of either side to
(continued . . .)

plaintiffs have a basic understanding of the contours of the case, their own purchase and use of citric acid, and the role of class representatives in general. Plaintiffs' corporate representatives do not have comprehensive knowledge of the litigation; however, the inability to name all defendants, to explain the strategy underlying the complaint, or to understand how antitrust damages are calculated does not amount to startling unfamiliarity.[13]
*13

This case is distinguishable from authority cited by defendants. For example, in Burkhalter Travel Agency v. MacFarms Int'l, Inc., the court deemed the plaintiff an inadequate representative because its executives did not understand who the defendants in the action were, did not know the composition of the class, and did not understand purchasing and pricing policies in their own firm or in the industry. *141 F.R.D. at 154.* In Rolex Employees Retirement Trust v. Mentor Graphics, the representative could not describe the allegations of the complaint. *136 F.R.D. at 666.* In Welling v. Alexy, the representative was a frequent filer, who stated that his only role was to alert his lawyers that there was a possible case. *155 F.R.D. at 658.*

In this case, the proposed representatives all know that defendants were manufacturers, sellers, and distributors of citric acid; are able to identify the major defendants; understand that they the class is made up of purchasers of citric acid who may have been the victims of price-fixing;

(. . . continued)
provide complete deposition transcripts. This evaluation is therefore based only on review of selected excerpts.

[13]Moreover, defendants' allegations of unfamiliarity frequently overstate the case. For example, defendants suggest that Daniel Weiss, corporate representative for Trans-Packers Services, had "no idea" about Trans-Packers' purchase volume in recent years. Def. Mem. at 7. In fact, the deposition transcript reveals that Mr. Weiss characterized the volume as small, and merely stated that he could not give precise percentages. Weiss Dep. at 17. Read in context, the testimony of the corporate representatives does not demonstrate startling unfamiliarity.

and demonstrate an understanding of the purchase and use of citric acid in their own businesses.

Regarding defendants' argument that plaintiffs have no *14 personal knowledge of price-fixing, defendants do not cite, nor is the Court aware of, any authority requiring personal knowledge to establish familiarity with a class action. Moreover, it defies common sense that plaintiffs alleging a conspiracy would have personal knowledge of it, unless they were involved. presumably, if plaintiffs had been involved as beneficiaries of the conspiracy, they would not need to bring this lawsuit.

For these reasons, the Court finds the proffered representatives to be sufficiently familiar with the litigation.

b. Representativeness

In determining adequacy of representation, the Court must evaluate the ability of the named representatives to represent the interest of the class fairly and adequately. *In re Diasonics Sec. Litig., 599 F. Supp. 447, 452 (N.D. Cal. 1984).* This inquiry focuses on whether the representative has antagonistic or conflicting interests with the unnamed class members. *Weinberger v. Jackson, 102 F.R.D. at 844-855.*

Defendants argue that plaintiffs do not adequately represent the broader class for a number of reasons:

- All except 7-Up, San Francisco purchased citric acid only sporadically during the class period;
- *15 Southeastern Specialty and 7-Up, Philadelphia are no longer involved in businesses that use citric acid;
- Trans-Packers Services and Gangi Brothers have not purchased from defendants recently;
- 7-Up, San Francisco and Varni Brothers both purchased from cooperatives; and
- None of the plaintiffs purchased any non-food grade citric acid.

The Court finds that the variety among plaintiffs with regard to frequency, continuity, recency, and mode of purchase actually contributes to their representativeness because there will likely be similar diversity among members of the class. Having representatives who were small or sporadic purchasers, who have since stopped using citric acid, or who bought from cooperatives assures that class members in similar circumstances will have their interests protected.[14] *16

Defendants' argument that the named plaintiffs will not adequately represent the interests of class members who purchased different kinds of citric acid raises a more serious concern. The inquiry here, however, is not how many kinds of citric acid plaintiffs purchased, but rather whether each representative has sufficient incentive to present evidence that will establish the existence of the alleged conspiracy and its effect on the prices of all of the products purchased by the class members. See *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 1996 WL 380234, *5* (S.D.N.Y. 1996).

In cases in which plaintiffs allege that defendants conspired to set an artificially inflated base price for products, courts consistently certify classes because the complaints themselves provide sufficient incentive—individual plaintiffs cannot prove their own claims without proving the class claims. See id. at *8 (citing seven such cases). This case presents exactly that situation. The Court therefore finds the Proffered plaintiffs to be adequate class representatives.

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[14]Defendants assert that purchasing through a cooperative is not the norm. This fact actually supports the need for class representatives who used cooperatives to assure that their interests do not go unheard in the litigation.

B. Rule 23(b) Requirements

Plaintiffs argue that this class action can be maintained under Federal Rule of Civil Procedure *17 23(b)(3) because common questions of law or fact in the case predominate over questions affecting only individual members. In deciding this question, the Court must focus on liability issues. *In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 345 (E.D. Pa. 1976).*

To succeed in this action, plaintiffs will have to prove (1) that there was a conspiracy to fix prices in violation of the antitrust laws; (2) that prices were fixed pursuant to the conspiracy; and (3) that plaintiffs purchased products at prices that, as a result of the conspiracy, were higher than they should have been. See, e.g., *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-41, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).* On a motion for class certification, "plaintiffs' burden is to establish that common or 'generalized proof' will predominate at trial with respect to these three essential elements of their antitrust claim." *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 1996 WL 380324,* *6 (S.D.N.Y. 1996) (quoting *In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 685 (N.D. Ga. 1991)).* Defendants do not dispute that the existence of the conspiracy and the alleged price-fixing are *18 common to the litigation. They contend, however, that plaintiffs cannot show common impact, and therefore individual issues of fact and law will predominate.

Defendants argue that because citric acid comes in many forms and is used for many purposes, the pricing varies between products, making common proof of impact impossible. Diversity of products and pricing does not necessarily mean that plaintiffs cannot show class-wide impact, however. "Contentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected." *In re Folding Carton Antitrust Litig., 75 F.R.D. 727, 734 (N.D. Ill. 1977).*

Some courts find as a matter of law that impact can be shown on a class-wide basis in antitrust cases because "as a general rule, an illegal price fixing scheme presumptively impacts upon all purchasers of a price-fixed product in a conspiratorially affected market." E.g., *In re Alcoholic Beverages Antitrust Litig., 95 F.R.D. 321, 327 (E.D.N.Y. 1982).* A smaller number of courts carefully examine the facts of each case in order to determine whether common proof of impact is possible. E.g., *Windham v. American Brands, Inc. 565 F.2d *19 59 (4th Cir. 1977).* Even those courts that require plaintiffs to make a showing that common impact can be proven only require that plaintiffs "come forward with seemingly realistic methodologies," as plaintiffs have done in this case. *In re Brand Name Prescription Drug Antitrust Litig., 1996 WL 478547,* at *5 (N.D. Ill. 1994); see also *In re Industrial Gas Antitrust Litig., 100 F.R.D. 280, 289 (N.D. Ill. 1983).*

Those cases in which courts have denied class certification for inability to prove common impact have involved additional complications; for example, different market conditions, *Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144, 154 (N.D. Cal. 1992),* and individualized pricing and credit negotiation. *American Custom Homes v. Detroit Lumberman's Ass'n, 91 F.R.D. 548, 551 (E.D. Mich. 1981).* See also *In re Hotel Telephone Charges, 500 F.2d 86, 89 (9th Cir. 1974)* (forty million plaintiffs stayed in 600 different hotels).

This case seems more akin to *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 1996 WL 380234 (S.D.N.Y. 1996),* and other cases in which plaintiffs have alleged that defendants conspired to set list prices for a variety of products. *20 See also *In re Potash Antitrust Litig., 159 F.R.D. 682 (D. Minn. 1995); In re Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302 (E.D. Pa. 1980).* Because plaintiffs planned to prove at trial that defendants set artificially high list prices for their products, those courts certified the classes. The high list prices proved

the fact of impact, even if the degree of impact differed between products and purchasers.

Plaintiffs have submitted the declaration of Robert G. Harris, an economist, who avers that he has identified at least three formulae to measure the class-wide impact of price-fixing in this case: one that compares the list prices for citric acid products before, during, and after the alleged conspiracy; one that analyzes the economic rate of return in the industry; and one that compares industry capacity utilization and citric acid prices. Harris Decl. at 15-16. Dr. Harris expresses the most confidence in the "before and after" approach because of defendants detailed financial reporting, which he says will make it possible to calculate competitive benchmark prices for citric acid products and therefore measure overcharge. Harris Decl. at 14-15. This submission *21 is sufficient to show that means exist for proving impact on a class-wide basis, which is all that is required under the authority cited by defendants. See, e.g., *Klein, 94 F.R.D. at 660-661* (certification denied because data essential to methodology for calculating impact did not exist).[15]

Even if common impact cannot be proven, the Court may certify the class. The great weight of authority suggests that the dominant issues in cases like this are whether the charged conspiracy existed and whether price-fixing occurred. See, e.g., *In re Potash Antitrust Litig., 159 F.R.D. 682, 693-96 (D. Minn. 1995); In re Folding Carton Antitrust Litig., 75 F.R.D. 727, 734-35* ("courts have consistently *22 found the conspiracy issue the overriding, predominate question") (N.D. Ill. 1977); *In re Sugar Indus. Antitrust Litig. 73 F.R.D. at 342-355.* Moreover, class certification

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[15]Defendants correctly identify shortcomings with plaintiffs' other proposed methodologies; Dr. Harris does not suggest an industry to which citric acid can be compared for purposes of evaluating economic rate of return, and he cannot "confidently recommend" the capacity utilization approach. Harris Decl. at 16.

does not require that the common questions be completely dispositive of the litigation. *In re Sugar Indus. Antitrust Litig., 73 F.R.D. at 344.*

Because plaintiffs have presented a method for proving common impact, and because even without proof of class-wide impact, common issues predominate, the Court finds that plaintiffs have satisfied the requirements of Rule 23(b).

C. Court's Authority to Reconsider

Class actions play an important role in the private enforcement of antitrust actions. For this reason, courts resolve doubts in these actions in favor of certifying the class. *In re Potash Antitrust Litis., 159 F.R.D. at 688-69.* The Court retains the authority, however, to withdraw class certification in part or in whole, should the questions of adequate representation or predominance of common issues develop so as to make a class action unwarranted. *Social Serv. Union, Local 535 v. County of Santa Clara, 609 F.2d 944, 948-49 (9th Cir. 1979).* Other options short of decertification are also *23 available to the Court if individual issues arise but do not predominate. These include referral to a magistrate judge or creation of subclasses. *In re Brand Name Prescription Drugs Antitrust Litig., 1994 WL 663590,* at *5 (N.D. Ill. 1994). The Court will not hesitate to exercise these authorities if the circumstances warrant it.

CONCLUSION

For the reasons discussed above, the Court hereby grants plaintiffs' motion for class certification.
SO ORDERED.

DECISION OF THE UNITED STATES DISTRICT COURT, DATED JANUARY 23, 1998

In re CITRIC ACID LITIGATION.
This document relates to all actions.
Nos. MDL 1092 FMS, C 95-2963 FMS.

United States District Court,
N.D. California.
Jan. 23, 1998.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
FERN M. SMITH, DISTRICT JUDGE

INTRODUCTION

Defendant Cargill's motion for summary judgment requires the Court to consider whether there is a genuine issue of material fact about whether Cargill participated in a conspiracy to fix the price and allocate market share of citric acid. The Court holds that no reasonable jury could find that Cargill was a participant, and so grants Cargill's motion.

BACKGROUND

Citric acid is a corn derivative with a wide variety of uses in the manufacture of food, soft drinks, detergents, and pharmaceuticals. The citric acid market is dominated by a small number of major producers. Between 1991 and 1995, four of those producers Haarman & Reimer ("H & R"), Hoffman LaRoche ("HLR"), Jungbunzlauer ("JBL"), and Archer Daniels Midland ("ADM")—admittedly conspired to divide the market among them and to raise the price of citric acid by limiting sales. At high-level meetings top executives known as "masters" allocated market shares to within a tenth of a percent. The masters monitored each other by exchanging their monthly sales figures over the telephone. If a conspirator had sold more than its allocation, it was

required to purchase the excess from its co-conspirators. The conspiracy was implemented by lower level corporate officials known as "Sherpas." During the time of the conspiracy, the price of citric acid rose from $0.63/lb to $0.85/lb.

After learning of the conspiracy, the Department of Justice began an investigation that culminated in criminal charges to which the four conspirators pled guilty. Several civil cases followed closely on the heels of the criminal proceedings. The four companies that bad pled guilty in the criminal prosecution settled. Cargill, Inc., the fifth major producer, however, was not indicted, has not settled and now brings this motion for summary judgment, asserting that it was never a member of the conspiracy.

Defendant Cargill, a privately held company, has only become a large-scale producer of citric acid in the last decade. Cargill did not decide to enter the citric acid market until 1988, but it rapidly built both production capacity and market share. By 1990 it had constructed a plant with an annual capacity of 56 million pounds, which it expanded first to 80 million pounds in 1992 and then to 120 million pounds by 1994. During these years Cargill sold all the citric acid it produced. Cargill's domestic market share rose from 0% in 1990 to about 20% by the mid-1990's. Its citric acid prices generally followed those of the conspirators. During this period of rapid domestic expansion, Cargill was also investigating ways to enter the European, Asian, and Latin American markets. After considering such options as a joint venture with one of its competitors and the purchase of various manufacturing plants, and after holding various meetings with those corporations about those possibilities, Cargill eventually decided to build a new plant in Brazil.

In 1993, Cargill joined the European Citric Acid Manufacturers Association ("ECAMA") which included as members ADM, HLR, H & R, and JBL, as well as several non-conspirator companies. ECAMA is a trade association that collects production and sales data from its members,

audits the data through an independent auditor, and then releases to its members aggregate data but not company-specific information. This process is intended to allow its members to learn about the overall state of the world market without divulging secret information to each other.

In this motion, plaintiffs seek to prove that ECAMA was actually used as a front for the illegal exchange of secrets among the conspirators. They also argue that Cargill's parallel pricing and various meetings with the conspirators provide sufficient circumstantial evidence of participation in the conspiracy to avoid summary judgment. For the reasons set forth in this order, plaintiffs are wrong.

DISCUSSION

I. LEGAL STANDARD

A. Summary Judgment

To withstand a motion for summary judgment, the opposing party must set forth specific facts, admissible in evidence, showing that there is a genuine issue of material fact in dispute. *See* Fed.R.Civ.P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in the light most favorable to the non-moving party. *See T.W. Elec. Serv., Inc.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). In doing so, however, the Court may only draw inferences "that are reasonable given the substantive law which is the foundation for the claim," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir.1987), and must not "resort [ ] to guesswork or conjecture," *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir.1988).

A special rule applies to the use of circumstantial evidence in antitrust cases. "[W]here an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 440 (9th Cir.1990) ("*Petroleum Products*"). If the defendant succeeds in making such a showing, "the plaintiff must come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully." *Id.*

Plaintiffs assert that this rule does not apply to conspiracies to raise prices. The Court disagrees. The *Petroleum Products* rule is based on a reading of the Supreme Court's holding in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986), in which the Court refused to infer an antitrust violation from evidence of price-cutting, because "cutting prices in order to increase business is often the very essence of competition." *Id.*, 475 U.S. at 594. Although one district court from outside the Ninth Circuit has held that the rule of *Matsushita* is limited to conspiracies to reduce prices, *see In re Bulk Popcorn Antitrust Litigation*, 783 F.Supp. 1194, 1197-98 (D.Minn.1991), that is not the rule in the Ninth Circuit, for *Petroleum Products* applied *Matsushita* to a conspiracy to raise prices. *See Petroleum Products* at 436. The Court must therefore apply the *Petroleum Products* rule

to this case.

B. Sherman Act

Section 1 of the Sherman act prohibits "conspiracy . . . in restraint of trade or commerce." 15 U.S.C. § 1. The requirements for a civil conspiracy are the same as for a criminal conspiracy. *See Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988). A finding of conspiracy does not require an explicit or formal agreement. *See United States v. General Motors Corp.*, 384 U.S. 127, 142-43, 86 S.Ct. 1321, 16 L.Ed. 2d 415 (1966). "It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." *Jones* at 992.

C. Slight Evidence Rule

Plaintiffs assert that because the existence of a conspiracy has been proven, they need only provide "slight evidence" that defendant was a member of the conspiracy. The "slight evidence" rule, however, is a rule of criminal appellate procedure not properly applied to a motion for summary judgment. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1169 (E.D.Pa 1981), *aff'd in part and rev'd in part on other grounds*, 723 F.2d 238 (3d Cir.1983), *rev'd*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (rule has "no application to a district court determination of a summary judgment motion"). Plaintiffs have cited one case from this district that did apply the slight evidence rule to a defendant's motion for summary judgment in a civil antitrust case. *See U.S. Audio & Copy Corp. v. Philips Bus. Sys.*, 1983 WL 1818, *2 (N.D.Cal.) (Patel, J.). That case, however, is not binding on the Court. Nor is the opinion applicable to this case, for it failed to consider whether the use of the slight evidence rule modified the standard of proof for summary judgment motions

established in Rule 56.

Moreover, the Ninth Circuit has stated that "after much reflection we are of the mind that the slight evidence rule may be of doubtful application when the issue for review concerns whether the defendant was connected with the conspiracy at all." *United States v. Dunn,* 564 F.2d 348, 357 n.21 (9th Cir.1977). Because defendant's connection to the conspiracy is precisely the issue here, and because the Court believes that following the slight evidence rule in a summary judgment motion would be inconsistent with the summary judgment standard established by the Supreme Court, the Court holds that the slight evidence rule does not apply.

II. ANALYSIS

A. Evidence That Cargill was not a Conspirator

Cargill offers convincing direct testimonial evidence that it was not involved in the conspiracy. Most persuasive is the testimony of Hans Hartmann, the President of H & R GmbH, who pled guilty to being a member of the conspiracy. He stated that no one from Cargill attended any of the meetings at which the conspirators allocated market share, (Decl. of Steven C. Keller Ex. 6 ("Pls.' Ex.") at 275-76), and that he never received sales figures from Cargill (*Id.*, at 202). When asked whom he meant by "the conspirators," he listed JBL, HLR, ADM, and H & R, and did not mention Cargill. (*Id.*) He also referred to the conspirators as a "group of four." (*Id.* at 71-72.) In addition, all Cargill employees who were deposed denied that Cargill was involved in a price-fixing conspiracy. (Def.'s Mem. in Supp. of Mot. for Summ. J. ("Def.'s Mem.") at 12.)

It is also significant that there is no direct evidence that Cargill was involved in the conspiracy. Under normal circumstances no inference can be drawn from the lack of direct evidence for, as many cases note, direct evidence of a conspiracy is rare. "[S]olemnized covenants to conspire are difficult to come by in any price fixing case." *In re Plywood*

Antitrust Litigation, 655 F.2d 627, 633 (5th Cir.1981). This case is different. There was abundant direct evidence of conspiracy among four companies: H & R, HLR, JBL, and ADM. In fact, all four companies pled guilty to criminal charges and have been sentenced. None now have any reason to shield Cargill. The utter lack of any direct evidence that Cargill was involved in that conspiracy is therefore quite probative.

B. Lack of Evidence That Cargill Was a Conspirator

In contrast to the strong evidence suggesting that Cargill was not involved in price fixing, plaintiffs' evidence is insufficient to create a genuine issue of material fact. Apparently hoping that quantity will substitute for quality, plaintiffs have submitted voluminous but weak circumstantial evidence that they argue indicates that Cargill was a member of the conspiracy. Although the Court will discuss this purported evidence piece by piece, it is mindful that it must weigh the evidence as a whole, "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

1. Parallel Pricing

In an industry dominated by a few major players, parallel pricing, by itself, is generally insufficient to prove an antitrust conspiracy. *See Petroleum Products*, 906 F.2d at 444-45.[16] This presumption is based on the recognition that

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[16]"In some cases, when a market is highly unconcentrated, parallel pricing alone may be all the proof that is required." *Id.* at 445 n.9. Plaintiffs misquote this sentence, asserting that parallel pricing is all that is required when a market is highly *concentrated.* (Pls.' Mem. in Opp. at 25.) Such an egregious error on a central point of law diminishes

(continued . . .)

interdependent pricing is a common feature of concentrated markets, and on the concern that allowing conspiracy to be found solely on the basis of parallel pricing would deter legitimate pricing decisions. *See id.* at 443-35. Although the parties in this case agree that Cargill's prices tracked those of the conspirators, two circumstances make it particularly difficult to draw any inference of collusion from that pricing evidence. First, the citric acid market is highly concentrated. Second, Cargill has presented evidence that at the time that it was raising its prices in parallel with the rest of the industry, it was producing at full capacity and selling all that it produced. (App. to Cargill's Mot. for Summ. J. ("Def's App.") 1 at 377.) Under those circumstances, undercutting its competitors would have been economically irrational, for Cargill, with nothing left to sell, could not have increased its market share. Likewise, Cargill's sales and marketing plans for 1992 and 1993, which stated that Cargill would follow any price increases by competitors', (Pls.' Ex. 101, 107), are not evidence of conspiratorial behavior, but simply normal business practice for a corporation selling all its production in a concentrated commodity market.[17]

2. Membership in ECAMA

Plaintiffs argue that Cargill's membership in ECAMA is evidence that it was a member of the conspiracy. According to plaintiffs' theory, the conspirators used ECAMA to monitor each others' market shares and make sure no one was "cheating" on their secret agreement. Plaintiffs assert that Cargill was fully aware of ECAMA's role in the conspiracy, and joined the organization not for

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(. . . continued)
plaintiffs' credibility and borders on a violation of Federal Rule of Civil Procedure 11(b)(2).

[17]Plaintiffs' quotations from the sales reports of Fritz Gruber, Cargill's national sales manager, must rationally be interpreted the same way.

any legitimate business purpose, but rather to provide the conspirators with business information that would reassure them that Cargill was not attempting to increase its market share by undercutting prices.

The evidence in no way supports plaintiffs' conspiracy theory about ECAMA. Plaintiffs have not produced any admissible evidence that ECAMA was "a sham and nothing but a pretext to monitor the conspiracy." (Pls.' Mem. in Opp. to Mot. for Summ. J. ("Pls.' Mem.") at 11.) They rely primarily upon a 1995 affidavit executed by FBI agent Brian D. Shepard to obtain a search warrant to search the corporate headquarters of ADM. The affidavit, however, is inadmissible hearsay because it reports what agent Shepard said the cooperating witness said Terry Wilson said; the Court cannot consider inadmissible evidence in a summary judgment motion. *See Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 n.9 (9th Cir.1980).[18]

Plaintiffs also point to a phrase in the handwritten notes of an ADM employee from an ECAMA meeting. (Pls.' Ex. 105.) The four pages of notes mostly relate to China's production of citric acid. On page three the notes list three requirements for a finding of "dumping," an illegal trade practice that ECAMA members believed China was engaging in: "1) export price below normal value . . . 2) must cause injury . . . and 3) must prove injury was caused by dumping." Then a line is drawn across the page. Below that is written, "Undertaking is a confidential agreement to

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[18]Even if the Court could consider the affidavit, it provides evidence about ECAMA's role that is ambiguous at best. Although the affidavit states that Wilson provided information "about how the citric acid producers used a trade association as a pretext for improper communications concerning pricing and sales volumes," it also states that Wilson said that "the volumes are shared every month, not by ECAMA, but through another method that we have." (Pls.' Ex. 3.) The affidavit thus supports Cargill's contention that although ECAMA meetings provided convenient opportunities for the conspirators to meet privately, ECAMA's data aggregation process was not how sales volumes were shared.

maintain price. Producers must police." In their opposition brief plaintiffs imply that this is an explicit reference to the conspiracy. (*See* Pls.' Mem. at 24.) From the context of the notes, however, this phrase does not appear to be a smoking gun proving ECAMA's involvement in the conspiracy, but simply a small part of an abstract discussion of what generally constitutes illegal trade practices.

Plaintiffs also point to a Cargill memorandum that describes the content of an ECAMA meeting it attended on December 20, 1994. The memorandum states that there was "[a] long debate devoted to prices and volumes. All figures at hand inconsistent. Conclusion was that only real prices could be compiled if members were willing to give real prices." (Pls.' Ex. 186.) Again, from the remainder of the memorandum, it is apparent that this "debate about prices" occurred in the context of a discussion of anti-dumping measures. Moreover, Cornelia Johanna van Dijk, the Cargill employee who wrote the memorandum, testified at her deposition that she recalled the "debate," and that instead it related to a "questionnaire that had to be filled out . . . and it was no discussion on prices." (Def.'s App. 49 at 49.) This testimony is consistent with the memorandum, which concludes, "Jack if you wish I can fax you the questionnaire that has to be filled out." (Pls.' Ex. 186.) The memorandum thus does not support a rational inference that ECAMA was a front for the improper exchange of citric acid price information.

On the other side of the ledger is the sworn testimony of Hans Hartmann. He stated that price fixing and market allocation were never discussed at the ECAMA meetings he attended, and that the conspirators' exchange of information regarding sales volume was "completely separate" from "the information that was provided and compiled . . . through ECAMA." (Def's App. 44 at 277-278.) Based on this evidence, the Court holds that no reasonable juror could find that ECAMA was used as a pretext for the improper exchange of information.

Given the conclusion that ECAMA was a legitimate trade association, the Court cannot draw any inference of conspiracy from Cargill's active participation in the organization, nor from the alleged fact that Cargill was recruited to join by the conspirators. Nor have plaintiffs provided any evidence suggesting that Cargill believed ECAMA to be a monitoring tool for the conspirators.

It is true that ECAMA provided the conspirators with audited information about the overall size of the citric acid market, information that each individual conspirator could then use to determine whether it had the market share to which it was entitled under the conspiracy. That function of providing generic market information, however, is legitimate; allowing the aggregation of company data through a legitimate group such as ECAMA to be used as evidence of conspiratorial behavior would significantly deter membership in trade associations. Under *Petroleum Products*, such an inference is therefore improper, if Cargill can show a legitimate reason for its membership in ECAMA. *See Petroleum Products*, 906 F.2d at 440.

Despite plaintiffs' argument to the contrary, Cargill has shown that it had good business reasons for joining ECAMA. According to a contemporaneous memo written by a Cargill employee, Cargill expected to benefit from ECAMA membership by obtaining "a more accurate picture" of the state of the world market, which was necessary given their global expansion plans, and by being informed about ECAMA's research on new applications for citric acid. (Def's App. 11 at 360-61.) Cargill did recognize that when it first reported its data to ECAMA, its competitors would be able to learn specific information about Cargill by comparing the market totals from before and after it joined; it believed, however, that that effect would last only for the "first several months," (*id.*), a belief that seems quite reasonable given Cargill's rapid growth up to that time. Because Cargill has provided a convincing explanation for its decision to provide its sales data to ECAMA, it would be improper to infer

conspiracy from Cargill's membership, given the deterrent effect such a ruling would have on the legitimate activities of trade associations.

In sum, plaintiffs are urging the Court to peer through a triple lens of speculation: to speculate that ECAMA was a monitoring tool for the conspiracy, to speculate that Cargill knew that, and to speculate that Cargill joined in order to reassure the conspirators that it would not disrupt the conspiracy. The evidence for each link in the chain is weak at best. Drawing an inference of participation in conspiracy on the basis of this evidence would be wholly improper for any rational trier of fact.

3. Business Meetings with Conspirators

In their opposition brief, plaintiffs refer to eighteen meetings that took place between Cargill and various members of the conspiracy between 1991 and 1995. (*See generally* Def.'s App. 60.) Plaintiffs offer three theories for why these meetings show that Cargill was a member of the conspiracy. They argue that the meetings must be considered direct evidence of conspiracy, that prices were improperly discussed at the meetings, and that the meetings provided an opportunity to conspire. The Court rejects each of these theories.

a. Meetings as Direct Evidence

At oral argument, plaintiffs asserted that the meetings between Cargill and its competitors could be considered direct evidence of conspiracy, making *Matsushita* inapposite. *See Petroleum Products*, 906 F.2d at 440-41 ("the *Matsushita* standards do not apply when the plaintiff has offered direct evidence of conspiracy"). As support for the proposition that evidence of a meeting between conspirators should be considered direct, rather than circumstantial, evidence of a conspiracy, plaintiffs rely on *Arnold Pontiac-*

GMC v. Budd Baer, Inc., 826 F.2d 1335 (3rd Cir.1987). Their reliance is misplaced. The direct evidence in that case was not the mere fact that the conspirators met, but rather the fact that at the meeting they explicitly agreed to work together to exclude the plaintiff from the relevant market. *See id.* at 1336. Although Cargill met with the conspirators in this case, there is no evidence that conspiratorial action was ever discussed at those meetings. *Arnold Pontiac* is thus inapposite. The meetings can only be considered circumstantial evidence of conspiracy.

b. Discussion of Prices

Plaintiffs point to four occasions on which Cargill employees discussed citric acid prices with the conspirators as evidence that they were colluding to set prices. Although the exchange of confidential information about specific sales to specific customers can be evidence of anticompetitive behavior, *see United States v. Container Corp. of America*, 393 U.S. 333, 334-37, 89 S.Ct. 510, 21 L. Ed. 2d 526 (1969), the exchange of publicly available information does not support an inference of conspiracy. *See Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 526 (9th Cir.1987). Some of the price information exchanged in this case was already public knowledge. By the time an HLR employee mentioned at an April 17, 1991 meeting with Cargill that the price of citric acid was $0.68/lb (Pls.' Ex. 90, 150), both Cargill and HLR had already informed their customers of that price (Def's App. 52, 56); because each company had already set that price, the statement does not tend to show that the parties used their meeting to collusively arrive at it. Similarly, by the time Cargill informed H & R of its price increase to $0.82/lb at a meeting on September 16, 1992 (Pls.' Ex. 163 at 666), it had already announced that price increase to its customers (Def's App. 51). Moreover, Cargill employee Paul Conway, who was present at the meeting, testified at his deposition that although he did not recall

stating that Cargill was increasing its price to $0.82, "If I knew of any price, it was something that was already publicly available." (Dep. of Paul Conway, Def.'s App. 46, at 43.)

Other mentions of price were innocuous for different reasons. A letter from ADM to Cargill informing them of a price increase appears to relate to a particular sale from ADM to Cargill, not to the ADM's general list price. (*See* Pls.' Ex. 91.) The negotiation of a price in the course of a swap agreement between Cargill and JBL was done, according to Cargill, because it was required by United State transfer pricing law. (Def.'s App. 42, at 123-25.) With regard to all of these meetings, the fact that Cargill discussed prices does not necessarily mean that it agreed to fix prices, or that it improperly exchanged price information. These meetings are circumstantial evidence that is weak at best; they do not support a rational inference that the Cargill was a member of the conspiracy.

c. Opportunities to Conspire

Finally, plaintiffs argue that Cargill's meetings with the conspirators provided opportunities to conspire, and thus are a "plus factor' supporting an inference of conspiracy. Where cooperation is necessary for a legitimate business purpose, the mere opportunity to conspire at business meetings is insufficient to support an inference of conspiracy. *See Wilcox*, 815 F.2d at 527. In evaluating plaintiffs evidence, the Court notes first that one of the disputed meetings took place in 1990, before the admitted conspiracy among the ADM, HLR, H & R, and JBL had even begun. Cargill asserts that this meeting, as well as all the others, were conducted for proper, non-conspiratorial, purposes. Specifically, it asserts that its two meetings with HLR in 1991 and its two meetings with JBL in June 1994 related to Cargill's potential acquisition of citric acid plants. (Def's App. 60.) Cargill argues that at its September 1992

meeting with H & R, the corporations discussed the possible sale of glucose to H & R. (*Id.*) Cargill has thus adequately rebutted this "opportunity" plus factor. Moreover, these meetings have even less probative value when viewed in light of the way the conspiracy admittedly functioned. When H & R, HLR, JBL, and ADM decided to fix prices, they did so by meetings among the "masters" exclusively devoted to price fixing. Cargill was never present at those meetings. Hans Hartmann's deposition does not indicate that the conspirators used legitimate meetings as a front for discussions of price fixing. Nor do plaintiffs even argue that the disputed meetings were attended by the "masters" or the "Sherpas," the only officials at the conspirator corporations who knew about the price-fixing scheme.

4. Notice of Competitors' Price Increases

Plaintiffs assert that Cargill had advance notice of the conspirators' price increases. Although such advance notice would tend to support an inference of conspiracy,[19] the evidence presented in this case does not suggest that Cargill in fact had advance notice. Plaintiffs point the Court to pricing announcements of the conspirators which were found among Cargill's records, and to Cargill pricing announcements which were found in the conspirators' records. (Pls.' Ex. 111-41.) These pricing announcements were apparently sent to customers. Based on their date stamps, they were received by the competitor corporations only after they had been mailed to customers. For example, the H & R pricing announcement in Plaintiffs' Exhibit 111

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[19]The Court states that proposition as a matter of logic, rather than of Ninth Circuit law, for plaintiffs cited no Ninth Circuit decision in this section of their brief. The one case they erroneously asserted to be from the Ninth Circuit is in fact from the Eighth Circuit. *See ES Development, Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 554 (8th Cir.1991). (Plaintiffs did, however, cite the case correctly in their table of authorities, if not in the body of their memorandum.)

was mailed to customers on February 24, 1992; it was faxed to Cargill on March 2, 1992. The Court can find no document that appears to have been sent to the competitor corporation first.

The document that comes the closest is plaintiffs' exhibit 113, an ADM price announcement letter that was faxed from one Cargill facility to another on March 13, 1992, which is the same date that appears on the announcement. Plaintiffs argued at the hearing that this letter could not possibly have reached Cargill on the same day it was sent to ADM's customers unless ADM faxed it directly to Cargill. That is a speculative conclusion. Nothing on the fax indicates how Cargill received the letter. The letter may well have been faxed to Cargill from one of its customers, who may have received it from ADM by fax.

There is in fact evidence that Cargill's customers sent it copies of price increases that had been announced by Cargill's competitors. (*See* Def's App. 41 at 233 (deposition testimony of Cargill employee Robert Simpson that "generally if a customer referred to a price announcement, we would ask them to fax it to us.").) The attempt to glean from customers market information about competitors is proper competitive behavior. Holding it to be evidence of antitrust violation would significantly deter such behavior, in violation of *Petroleum Products*.

5. Failure to Expand Capacity as Much as Planned

Plaintiffs argue that Cargill's decision to expand its capacity less than originally planned indicates that it was accommodating the cartel by restraining production. After announcing plans in March 1992 to expand its production capacity from 80 to 160 million pounds per year, in October 1992 Cargill chose instead to expand its plant to 120 million pounds. It is impossible to draw an inference of conspiracy from this evidence. Over the time period in question, Cargill

was not reducing its production, or even holding it steady. Instead, it was increasing production by half. Moreover, an internal Cargill report from October 1992 documents several business reasons for the slower expansion. Cargill was concerned that the switch to liquid extraction technology could decrease product quality and alienate customers, and that the increase in production could drive down prices (although the impact was not expected to be "serious"). (Def's App. 21 at 257-59.) Given these circumstances, no reasonable juror could conclude that Cargill's business decisions were evidence that they were participating in the conspiracy.

6. Flat Market Share

In a related vein, plaintiffs allege that Cargill's market share, after growing rapidly between 1990 and 1993, remained flat between 1993 and 1995. The evidence, though not entirely clear on this point, belies plaintiffs' claim. According to Cargill's internal documents, its North American market share grew from 18.7% in 1993 to 21.0% in 1994. (Def.'s App. 27, at 5.)[20] Moreover, Ernest Micek, a Cargill employee, testified that Cargill's market share "grew annually."

(Def.'s App. 1 at 377.) Plaintiffs assert that Cargill's market share was 22% in 1993, and 21% in 1994 and 1995. As evidence, plaintiffs cite to well over 100 pages of Cargill strategic reports in which the Court is unable to find any clear statement of Cargill's market share. (Pls.' Ex. 92-95.)[21]

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[20]Cargill's market share in the rest of the world was negligible. The document does not give market share for 1995.

[21]*See Schneider v. TRW, Inc.*, 938 F.2d 986, 990 n.2 (9th Cir.1991) ("[A] district court is under no obligation to mine the full record for triable issues of fact."); Schwarzer, *et al.*, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 480-481 ("(T]he opposing party should specifically identify the portions of the record relied on to enable the court to readily find them.")

The evidence thus indicates that although the growth rate of Cargill's market share slowed during the years of the conspiracy, the share nevertheless increased more than two percent between 1993 and 1995. During this time, the conspirators were allocating market share to within a tenth of a percent. It is impossible to draw an inference of conspiracy from Cargill's market share when it changed so much more than would have been allowed had it been participating in the conspiracy.

7. Fifth Amendment Invocations of Conspirators[22]

Plaintiffs seek to introduce evidence of numerous Fifth Amendment invocations by the conspirators. Such invocations are admissible in a civil case as long as they are relevant and not otherwise barred by the rules of evidence. *See FDIC v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969, 977 (5th Cir.1995). The Court holds that the depositions are not relevant to this case. When asked whether Cargill was involved in the conspiracy, numerous conspirators invoked their Fifth Amendment right against self-incrimination, doing so for every single question asked. Plaintiffs assert that the conspirators would have exonerated Cargill if they could have done so truthfully, for doing so would have reduced the amount of antitrust injury suffered by the plaintiff class, thus lessening the possible scope of their joint and several treble damage liability. (Pls.' Req. for Jud. Notice of Fifth Amendment Dep. at 6 n.9.) That is pure speculation and lacks logical support.

Many of the questions in the deposition were phrased in a way that made it impossible for the deponents to

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[22]Plaintiffs' filing a separate motion on the Fifth Amendment issue is a transparent attempt to evade the thirty-three page limit the Court set for their opposition brief. Nevertheless, the court will consider plaintiffs' argument on this point.

exonerate Cargill without acknowledging the existence of a conspiracy. For example, one deponent was asked whether "a representative of Haarman & Reimer participated in meetings with representatives of other defendants, including Cargill, and agreed to fix, maintain the price of citric acid in the United States and around the world?" (Pls.' Reg. for Jud. Notice, Ex. 1.) The only inference the Court can draw from the deponent's invocation of the Fifth Amendment in response to that question is that the deponent was refusing to address whether Haarman & Reimer participated in a conspiracy. Although some of the other questions involved Cargill only, the deponents could not have answered those questions, even if they believed Cargill innocent, without appearing to be hiding something in the questions they had refused to answer. Once a party invokes the Fifth Amendment for any question, it is its right to invoke it for all questions.[23] For that reason, no inference that Cargill conspired can fairly be drawn from these depositions.

C. Summary

Even drawing all inferences in plaintiffs' favor, as the Court must,: the evidence in this case fails to raise any genuine issue of fact that defendant Cargill was a member of the conspiracy to fix citric acid prices. Drawing an inference of conspiracy from the evidence proffered by plaintiffs would require the sort of speculation and guesswork that the Court is forbidden to undertake.

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[23]Counsel for Mark Witacre made exactly this point during a deposition, explaining that "I've got to ask my client to even take the fifth on his name because once you take the fifth, you have to invoke the fifth throughout the whole proceeding." (Pls.' Req. for Jud. Notice, Ex. 15, at 7.)

CONCLUSION

Because no reasonable jury could, on the basis of this record, conclude that defendant Cargill was a member of the conspiracy, the Court GRANTS defendant's motion for summary judgment. Judgment will be entered in accordance with this order.

SO ORDERED.

NOT FOR PUBLICATION
[FILED OCTOBER 21, 1999]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CITRIC ACID LITIGATION 7-UP BOTTLING CO. OF JASPER INC., et al., Plaintiffs, and VARNI BROTHERS CORP., on its own behalf and all others similarly situated dba Seven-Up Bottling of Modesto; 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC. Plaintiffs-Appellants, v. ARCHER DANIELS MIDLAND CO., INC., a Delaware corporation, et al., Defendants, and CARGILL, INC., Defendant-Appellee.	No. 98-15344 DC# MDL-01092-FMS ORDER

Before: O'SCANNLAIN, MCKEOWN, and WARDLAW, Circuit Judges.

The American Antitrust Institute's motion for leave to file amicus brief is GRANTED. The State of California's motion for leave to file amicus brief is GRANTED.

We have given careful consideration to the appellants' argument in the petition for rehearing that the opinion's summary judgment standard conflicts with *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). We believe this argument is misplaced. Although the *Kodak* Court explained the holding of *Matsushita*, it did not redefine *Matsushita's* summary judgment standard. Moreover, as the Court noted, the "principal issue" in *Kodak* related to tying and market power. *Id.* at 455. *Kodak* was not concerned with the sufficiency of evidence of conspiratorial acts alleged under § 1 of the Sherman Act.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

PERTINENT STATUTES

15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, §3, 88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, §2, 89 Stat. 801; Nov. 16, 1990 Pub.L. 101-588, §4(a), 104 Stat. 2880.)

60A-SF-116504

CARGILL

Cargill, Inc., Eddyville, Iowa, is another manufacturer of citric acid. Between 1992 and 1995, COX had approximately a dozen conversations with BILL GRUBER of Cargill on what COX called a "day-to-day level" regarding pricing for specific accounts. COX and GRUBER both initiated calls to the other at work during business hours. COX received only one of these calls at home. In each of these conversations, COX and GRUBER discussed what each would be bidding to particular CA accounts, including, Lever, Schreiber, M&M Mars, Coca-Cola, and P&G (Proctor and Gamble).

During one conversation with GRUBER, COX discussed leaving the price to M&M Mars where it was. In another conversation about the Lever account, one of them said, "I'm thinking of going in at [for example] 72¢." These discussions usually occurred toward the end of the year when contracts came up for renewal. They would talk about "x" being a good price for an account. On one occasion, GRUBER and COX together talked with Skelly [of Haarmann & Reimer] about the Proctor & Gamble account to identify who obtained the business, after the P&G bid had been made.

The effect of the GRUBER/COX conversations is that Cargill and ADM would bid at close to the same price, but not the identical price, as that would look suspicious. COX felt at the time that his conversations with GRUBER were improper, although he didn't think it was that bad in comparison to what was going on with G-4 and G-5. COX felt it was understood between GRUBER and himself that they should keep quiet about these conversations. WILSON was aware of the COX/GRUBER conversations, as COX told WILSON about them. WILSON never reacted or said anything to COX about the calls.

When Cargill was considering leading a CA price move to 76¢ in approximately the 2nd quarter of 1992, GRUBER called COX to see if ADM would be supportive. COX told GRUBER that he thought it was a good idea. COX believes GRUBER would have known that his response meant ADM would support the increase, and ADM did, in fact, follow the price increase.

In 1992 or 1993, the topic of Cargill came up at an

BEST AVAIL

"unofficial" CA meeting. There was a discussion of how to get messages to Cargill, how to control them, and whether or not Cargill should be given the message to back off, to not rock the boat. TERRY WILSON volunteered that the task to contact Cargill should be left with him. WILSON later mentioned to COX that he talked with MICK ANDREAS about ADM being the one to get a message to Cargill.

Cargill joined ECAMA in May 1993.In late May or early June 1995, the CA group discussed whether or not to invite Cargill to join the CA Group. SCHALLER, of Haarmann & Reimer, made an overture to Cargill. COX was asked to approach Cargill, but he declined. At some point, COX discussed with GRUBER the idea of Cargill joining ECAMA, but apparently Cargill was uncertain about whether ECAMA was a legitimate association. COX believes that Cargill's decision of whether to join ECAMA would have been made at a level higher than GRUBER's.

When the market started to flatten out, COX and GRUBER talked about each's company having to "absorb some of the hurt."

COX had a conversation in early 1992 with CRAEGER SIMPSON, of Cargill regarding buying sodium citrate.

SODIUM GLUCONATE

Overview

COX volunteered information regarding meetings ADM representatives attended with competitors regarding sodium gluconate(SG), a product that is used in industrial cleaners and de-rusting compounds, among other things. COX estimates there were five to ten such meetings between late 1991 and June 1995, at which the attendees discussed quotas and prices for SG, under an arrangement similar to that set up for citric acid. The companies involved in the SG meetings and agreements were:

ADM
Roquette Frères
Fujisawa
Akzo
Jungbunzlauer

ABLE COPY

ADMITTED CONSPIRATOR H&R'S DOCUMENT RE NOT COMPETING WITH OTHER ADMITTED CONSPIRATORS AND CARGILL (FROM 9TH CIRCUIT RECORD: APPELLANT'S EXCERPTS OF RECORD, VOLUME 10, PAGES 276-279)

[Confidential Material - Intentionally Omitted]

Cont'd

ISSUES/CONCERNS

III. **LOSS MARKET SHARE IN CANADA APPROX. 20%** 23.9% from 29% – 93 TO
IN VALUE CANADIAN DOLLAR & CONTINUED DECLINE

- **ACTIONS**
  - PROTECT CURRENT POSITION AT KEY ACCOUNTS.
  - ~~SELL~~ 60% COKE VS. PEPSI. ~~SELL~~ 55% & 50% IN 95 POINTS
  - SELL SELBY PRODUCT WITH DUTY DRAWBACK TO COMPETE WHEN NECESSARY.
  - RE-ESTABLISH POSITION AT CHEESE ACCOUNTS WITH SODIUM CITRATE. IN 2ND HALF 95
  - DO NOT ~~PUT~~ SELL BELOW $2.95/KG FOR REST OF MARKET

H&R(X) 03577

CONFIDENTIAL AND LAWYERS ONLY PURSUANT TO COURT ORDER

ER 00277

A73

H&R(X) 035776
CONFIDENTIAL AND LAWYERS ONLY
PURSUANT TO COURT ORDER
ER 00278

A74

Cont'd

ISSUES/CONCERNS

IV. SUPPLY IN SIGNIFICANT EXCESS OVER DEMAND (oversupply) ~~& DOWNWARD~~ PRESSURE ON PRICE. ↓ NO GROWTH IN MARKET

ACTIONS

- PROTECT POSITION AT CURRENT CUSTOMERS. IF POSSIBLE
- GROW AT MAJORS WITH THEIR GROWTH.
- GAIN SHARE AT ACCOUNTS WHERE HAS NO SIGNIFICANT EFFECT ON ADM, CARGILL, JBL SHARE. ~~-~~ TARGETED GADOT. 1700M 5000 1530 MILLS FROM GADOT
- CONTINUE TO WORK ON MARKET EXPANSION OPPORTUNITIES.
  - TEXTILE
  - PROCESSED MEATS
  - ~~PRECIPITATED SODIUM CITRATE FOR LAUNDRY & AUTODISH~~ AUTODISH
  - PAPER WHEN READY

- RE-ESTABLISH MAJORITY POSITION AT ~~[illegible]~~ PROCTER & GAMBLE 2ND HALF 95 ATLIMA ~~2ND [illegible]~~ ~~POSITION~~ ~~#1~~ COLUMBUS MS
  ✓ SUNDOR ~~2ND [illegible]~~
  REMACAMP

CONFIDENTIAL AND LAWYERS ONLY
PURSUANT TO CONT ORDER

H&R(X) 035777

Cont'd

ISSUES/CONCERNS

V. **QUALITY OF OUR PRODUCT VS. COMPETITION**
CITRIC , & MALIC

ACTIONS

- CONTINUE CUSTOMER NEEDS CAT; TOTALLY SOLVE METAL CONTAMINATION.
- ~~USE CAT AS NECESSARY TO MEET OTHER MAJOR CUSTOMER QUALITY NEEDS~~
SUGGEST DON'T FOR MALIC
- USE CAT AS NECESSARY TO MEET OTHER MAJOR CUSTOMER QUALITY NEEDS
of a supplier